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Lincoln's Inn. KWT
1813.
A

TREATISE
UPON
WILLS AND CODICILS,
WITH
AN APPENDIX OF THE STATUTES,
AND
A COPIOUS COLLECTION OF USEFUL PRECEDENTS,
WITH NOTES, PRACTICAL AND EXPLANATORY.

BY WILLIAM ROBERTS,

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AUTHOR OF A TREATISE ON VOLUNTARY CONVEYANCES,
AND ON THE STATUTE OF FRAUDS.

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TABLE OF CONTENTS.

CHAP. I.

<i>Part.</i>		<i>Page.</i>
	OF MAKING AND PUBLISHING WILLS	1
I.	<i>Progress of the Law</i>	<i>ibid.</i>
II.	<i>Testamentary Capacity</i>	27
III.	<i>Estates by Custom</i>	34
IV.	<i>Estates pur autre vie</i>	46
V.	<i>Powers to be executed by Will</i>	62
VI.	<i>Wills charging Lands</i>	77
VII.	<i>Attendant Terms</i>	90
VIII.	<i>Things affixed to the Freehold</i>	98
IX.	<i>Mortgages</i>	103
X.	<i>Election in Equity</i>	107
XI.	<i>Signature and Subscription</i>	121
XII.	<i>Formality of Publication</i>	137
XIII.	<i>Wills, interrupted and resumed</i>	141
XIV.	<i>Qualification of Witnesses</i>	148
XV.	<i>Time and Manner of making the Attestation</i>	163
XVI.	<i>Evidence of the Attestation</i>	179
XVII.	<i>Personalty</i>	191
XVIII.	<i>Charitable Uses</i>	211
XIX.	<i>Appointment of Guardians by Will</i>	233
XX.	<i>Statute of fraudulent Devises</i>	243

CHAP. II.

<i>Part.</i>		<i>Page</i>
	REVOCATION OF WILLS -	251
I.	<i>Construction of Sect. 6 of the Statute of Frauds</i> - - -	<i>ibid.</i>
II.	<i>Methods of Revocation</i> - -	256
III.	<i>Inconsistent Wills</i> - -	261
IV.	<i>Intention</i> - - -	273
V.	<i>Acts fraudently done, or procured to be done</i> - - -	281
VI.	<i>Subsequent Conveyances</i> - -	285
VII.	<i>Of subsequent Dealings with the Estate in Equity</i> - -	304
VIII.	<i>The Doctrine of Relation</i> -	317
IX.	<i>Mortgages, &c.</i> - - -	332
X.	<i>Partition</i> - - -	339
XI.	<i>Leases</i> - - -	348
XII.	<i>Cancelling</i> - - -	365
XIII.	<i>Alteration and Erasure</i> - -	377
XIV.	<i>Mistake</i> - - -	383
XV.	<i>Of the Doctrine of Revocation, as to Wills made under Powers</i> -	390
XVI.	<i>Subsequent Marriage, and Children</i>	395
XVII.	<i>Accident and Surprise</i> - -	408
XVIII.	<i>Effect of a Woman's Marriage upon her Will</i> - - -	411
XIX.	<i>Of the Revocation of Wills of Personal Estate</i> - -	416
XX.	<i>Satisfaction in Equity</i> - -	420

CONTENTS.

CHAP. III.

<i>Part.</i>	<i>Page.</i>
EVIDENCE AND CONSTRUCTION	428
I. <i>Double Portions</i> - - -	<i>ibid.</i>
II. <i>Debts paid by Legacies</i> - -	433
III. <i>Double Legacies</i> - - -	437
IV. <i>General Doctrine</i> - - -	442
V. <i>Of the presumptive Trust in the Ex- ecutor for the next of Kin of the Testator, as to the Surplus un- disposed of by the Will</i> -	448
VI. <i>Testator's Declarations, how far Evi- dence</i> - - -	453
VII. <i>Ambiguities</i> - - -	456

CHAP. IV.

REPUBLICATION OF WILLS - - -	476
-------------------------------------	------------

APPENDIX OF THE STATUTES - -	499
29 Car. 2, c. 3. <i>An Act for Prevention of Frauds and Perjuries</i> -	<i>ibid.</i>
25 Geo. 2, c. 6. <i>An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of</i>	

CONTENTS.

	<i>Page</i>
<i>Wills and Codicils, concerning real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America</i>	508
39 and 40 Geo. 3, c. 98. An Act to restrain all Trusts and Directions in Deeds or or Wills, whereby the Profits or Produce of real or personal Estates shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited	514

PRECEDENTS OF WILLS AND TESTAMENTARY DISPOSITIONS	516
<i>Power given in a Will to a Person to whom a Life-estate is limited, to charge the Estate with Portions for younger Children, varying in Amount with the number of Children to be provided for</i>	ibid.
<i>A convenient Form of a Will containing Dispositions of real and personal Property, the whole to form one Fund, and go as personal Estate</i>	519
<i>A Will disposing principally of real Property in Shares, among Children and Grandchildren</i>	531

CONTENTS.

vii

	Page
<i>A Will disposing of real and personal Estate by way of Provision for Children</i>	540
<i>A Will comprising various Dispositions of real and personal Estate, partly of Testator's own Estate, and partly in Performance of various Trusts and obligations imposed on him by antecedent Settlements</i>	552
<i>Part of a Will directing a Settlement, with Limitations in a strict Form for preserving the Estate in the Family of the Testator</i>	565
<i>A Will disposing only of personal Property</i>	589
<i>A Will equally dividing the Testators's whole Substance between his two Sons, being his only Children, subject to a Provision for his Widow.</i>	606
<i>A Will, comprising Directions for a Settlement of freehold, copyhold, and leasehold Estates, with various Limitations and Provisos, by Way of Annuities and Rent-charges, containing also various Bequests of Chattels and Sums of Money</i>	617
<i>A Merchant's Will, providing for the Continuance of his Trade under the Management of his Executors for the Benefit of his Family, and for the future Introduction of his Sons into the Business</i>	642
<i>A comprehensive Devise and Bequest of va-</i>	

	<i>Page.</i>
<i>rious descriptions of Property to Trustees for Sale and Accumulation of the Produce</i> - - -	676
<i>Devise of Advowson to Trustees, to present a certain Person to the next Avoidance</i> - - -	683
<i>Words of a Will, whereby a Testator charges his Debts, Legacies, &c. upon all his Estate</i> - - -	ibid.
<i>Clause to prevent an Annuitant under the Will from parting with his Annuity</i>	684
<i>Devise of Copyholds and Leaseholds for Lives and Years, to Trustees to the same Uses as the Freehold</i> - - -	685
<i>Devise of the Residue of Testator's personal Estate, in Trust, to sell, call in, dispose of, and convert into Money, such Part as shall not consist of Stock, or real Securities, and invest it in Securities, and thereout make Provision for a collateral relation</i> - - -	688
<i>Bequest of Jewels, &c.</i> - - -	689
<i>Appointment under a Power for the Benefit of Testator's younger Children</i> -	691
<i>Clause in a Will, directing a Power of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates</i> - -	693
<i>Clause in a Will, by which the Testator, after limiting his Estates to his Son for Life, remainder in the strict Form</i>	

	<i>Page.</i>
<i>to the Sons of such Son successively in Tail Male, limits the same to his two Daughters in Moieties, with Sur- vivorship for Life, to take exclusively of their Husbands, with the same Re- mainders in Tail to their respective Children in Succession, with cross ulti- mate Remainders ; the Whole being di- rectory of a Settlement to be made</i>	695
<i>Devise of a Sum to be applied in releasing poor Prisoners</i>	697
<i>Preamble to a Will, the Testator being about to go to Sea</i>	ibid.
<i>General Form of a Codicil to a Will where only a few additional Legacies are given</i>	698
<i>Another general Form of Codicil to a Will where several Legacies are revoked</i>	ibid.
<i>A nuncupative Will</i>	699
<i>Conclusion and Attestation of a Will, writ- ten on several Sheets</i>	700
<i>Common Form of Attestation</i>	701
<i>Attestation of a Codicil</i>	ibid.

INDEX OF THE CASES

CITED IN THIS VOLUME.

	PAGE
ABBOTT v. Abbott	449, <i>note</i>
Abbott v. Massie	467, <i>note</i>
Abney v. Miller,	351, 352, 355, 356, 357, 496
Acherley v. Vernon,	486, 488, 491, 492, 489, 490
Adams v. Adams	392, <i>note</i>
— v. Lingard	185, 186
Addis v. Clement	118, <i>note</i> , 119
Addy v. Grix	130, 136
Alexander v. Clayton	182, 183
Allen v. Poulton	686, <i>note</i>
Altham (Lord) v. Earl of Anglesea,	442
Andrews v. Emmett	71, <i>note</i>
Ansley v. Dowsing	155
Arthur v. Bokenham	300, 303
Ashburner v. Macguire	419, <i>note</i>
Ashburnham v. Bradshaw	386
Ashton v. Ashton	355, <i>note</i>
Attorney General v. Andrews	36
— v. Barnes	39 and 144, <i>note</i>
— v. Bowles	228
— v. Caldwell	226
— v. the city of Lon- don	215, <i>note</i>
— v. Downing	490
— v. Graves,	90, 221, <i>note</i>

	PAGE
Attorney General v. Herrick,	215, <i>note</i>
— v. Hyde,	22, <i>note</i> 228, <i>note</i>
— v. Johnson,	225, <i>note</i>
— v. Lloyd,	385, 386
— v. Meyrick,	106, <i>note</i> , 221, <i>note</i>
— v. Oglander,	215, <i>note</i>
— v. Oxford (Bishop of)	225
— v. Parnther	30
— v. Parsons,	229, <i>note</i>
— v. Robins,	633, <i>note</i>
— v. Sparks,	225, <i>note</i>
— v. Syderfin	214
— v. Vigor,	297, 298, 318, 319, 338, <i>note</i>
— v. Weymouth,	218, 219
— v. Whitely,	216 <i>note</i>
— v. Whorwood,	229 <i>note</i>
— v. Williams,	226, <i>note</i>
— v. Winchelsea (Earl of)	215 <i>note</i> , 226

B.		PAGE			PAGE
Bagshaw v. Spencer	-	432, note	Brice v. Smith	-	148, note
Basley v. Ekins	-	246	Brodie v. Duke of Chandos	-	227
Barclay v. Wainwright	-	438	Broderick v. Broderick	-	166
Bark v. Zouch	-	313, 314	Brograve v. Winder	-	159, note
Barnes v. Crowe	-	490, 492	Broome v. Monck	316, 478	note
Barnes v. Nash	-	225, note	Broughton v. Errington	-	434, note
Barton v. Cooke	-	539, note	Brown v. Heath	-	198
Bassett v. Bassett	-	403, note	—— v. Selwyn	436, 472, 475	
Baxter v. Dyer	-	271	—— v. Thompson	-	396
Baylis v. the Attorney General,	467,	note	Browning v. Wright	-	408, note
Beale v. Beale	-	403, note	Brownsword v. Edwards	-	429, note
Beauchamp v. Lord Hardwicke,		202, note	Brudenell v. Broughton	-	80, 88
Beaumont v. Bell	-	464	Brunden v. Woodridge	-	446, note
—— v. Fell	-	457	Brydges v. Duchess of Chandos,	287	
—— v. Thorp	-	250, note	note, 303 note, 305 note, 388,		
Beckford v. Parnecott	-	478, 479	309, 311, 345		
Bedell v. Constable	-	238	Buck d. Whalley v. Norton,	620,	note
Bennett v. Taylor	-	190, note	Buckeridge v. Ingram,	86 note, 88,	
Benson v. Scott	-	347	89 note		
Bent v. Baker	-	182, 186	Buller v. Buller	-	86 note
Berry v. Asham	-	248, note	Bunter, or Bunker v. Cooke,	296,	
—— v. Usher	-	522, note	297, note, 300, and 303		
Bibb v. Thomas	-	371	Burdett v. Hopegood	-	403, note
Bishop v. Burton	-	188	Burgess v. Wheate	-	338, note
Blandford v. Blandford	-	430, note	Burkitt v. Burkitt	-	41, note
Blandy v. Widmore	-	421	Burrows v. Locke	-	181
Blunt v. Clithero	-	425, note	Burtenshaw v. Gilbert	-	374, 376
Bond v. Seawell	142 note, 143 note		Butler v. Stratton	-	445, note
Bonifant v. Greenfield (Sir Richard)		521, note	—— v. Shalton	-	446, note
Boon v. Cornyforth	-	429, note			
Bostock v. Blackeney	-	524, note			
Boughton v. Boughton	-	111, 117			
Bowes v. Bowes	-	496, note			
Bradwin v. Harpur	-	464, note			
Brady v. Cubitt	-	399			
Braybrooke (Lord) v. Inskip,	338,	note			
Brett v. Rigden,	295, 297 note, and	447, 483			

C.

Caldecot v. Fitch & al.	457, note
Campbell v. French	384, 408
—— v. Radnor (Earl of)	441
—— v. Sandys	259, note
Carey v. Askew	35, 117, 118
Carleton v. Griffin,	141 note, 172
	note
Carrington (Lord) v. Payne	189
Cary v. Abbott	215, note

INDEX OF CASES.

xiii

	PAGE
Carte v. Carte	351, 357
Cartwright v. Cartwright	30
Castledon v. Turner	467 note, 469
Cave v. Holford	311
Chandos (D.) v. Talbot	632, note
Chapman v. Brown	229
—— v. Hart, 119, and 541,	note
Chaplin v. Chaplin	50
Chater v. Hawkins	150, note
Chaworth v. Beech	202, note
Chilcot v. Bromley	561, note
Christopher v. Christopher,	396 note, 399
Clarke v. Sewell	434, note
Clennell v. Lewthwaite,	448—451 note, and 452
Cliffe v. Gibbons	438, note
Clymer v. Littler	279, note
Cobbold v. Bowes	197
Coke v. Bullock	270, 271
Coker v. Guy	469, note
Coles v. Hancock	339, note
—— v. Trecothick	124, and 200
Cole v. Rawlinson,	429 and 542, note
Collett v. Lawrence	429, note
Coleman v. Coleman	419, note
Compton v. Compton	430, note
Constantine v. Constantine,	430, note
Cook v. Danvers	40 and 44
Cook v. Parsons	172
Coote v. Boyd	441
Cotter v. Layer, 41, 317 note,	393, 413
Copin v. Fernyhough,	355 note, and 358
Counden v. Clark	456, note
Cox v. Godsalve	99, note
Crane v. Drake	673, note
Cranvel v. Saunders	268, note
Crewys v. Colman, 444, 445, and	459, note
Croft v. Paulet	147, note
—— v. Slee	71, note
Crosbie v. M'Douall,	387, 699, note
Cunliff v. Seston	191, note

	PAGE
Cunliffe v. Cunliffe	429, note
Cuthbert v. Peacock	435, note
<hr/>	
D.	
Da Costa v. De Pas	215, note
Darley v. Darley	287, note
Davis v. Trigge	119, note
Davison v. Mellish	445, note
Day v. Trigge	119, note
Dayrell v. Glasscock	179
Debeze v. Mann	433
De Mazar v. Pybus	635, note
Denn d. Gaskin v. Gaskin,	620, note
—— Mellor v. Moore,	620, note
Devon (Duke of) v. Atkins	58
—— v. Kinton	54
Delmare v. Rebello	458, note
Dodson v. Hay	429, note
Doe, <i>ex dem.</i> Belasyse v. Lucan (Earl)	619, note
—— Briscoe v. Clarke,	620, note
—— Cook v. Danvers,	619, note
—— Gibbons v. Pott,	313, 314
—— Harris v. Greathead,	464, note
—— Hayter v. Joinville,	458
—— Tofield v. Tofield,	620, note
—— Wilkins v. Kesneys,	620, note
—— Wright & al. v. Child,	<i>ibid.</i>
Doe v. Clarke	403, note
—— v. Lancashire	398, 400, 408
—— v. Luxton	299, note
—— v. Porter	363
—— v. Staple	414, 416, note

	PAGE
Dormer v. Thurland -	132
Dorset v. Sweet -	458, note
Downing v. Townsend	190, note
Druce v. Denison -	453
Drury v. Smith -	14, note
Drybutter v. Bartholemew	89, note
Duke v. Doidge -	518, note

E.

Eagleton v. Kin -	194
East v. Cook -	428, note
Eastwood v. Vincke -	434, note
Eccles v. England -	429, note
Edge v. Salisbury -	458, note
Eggleston v. Speke -	258
Ekins v. Bailey -	248
Ellis v. Smith. 129, 135, 175, 259	
note, and 276, note	
— v. Ellis -	636, note
Ellison v. Cookson, 432, and 427, note	
Evelyn v. Evelyn -	86, note
Ewer v. Corbett -	673, note
Eyre v. the Countess of Shaftsbury,	
240	

F.

Farrington v. Knightley	448, note
Fergus v. Gore -	248, note
Ferrers and Curzen v. Fermor and others -	329
Fettiplace v. Gorges	29, note
Fisher v. Forbes -	99, note
Forse v. Hembling -	413
Forth v. Chapman	429, note
Forster v. Munt -	450
Fowes v. Salisbury -	298, note
Fowler v. Fowler	434 note, 435
Freemoult v. Dedire	247, note

	PAGE
French v. Squire -	221
Fuller v. Fuller -	479

G.

Galton v. Hancock -	86, note
Gastrell v. Smith -	380
Gawler v. Wade -	249, note
Gibbons v. Caunt -	398, 399
Gibson v. Lord Mountford, 431, note	
— v. Mountfort, 489, 490, 491	
Gines v. Kemsley -	458, note
Glazier v. Glazier -	498 note
Gofton v. Mill -	248, note
Goodright v. Forrester	298, note,
300, note	
— v. Glazier -	376
— v. Harwood	263, note
Goodtitle v. Holford -	306
— v. Otway, 306, 323, 332,	
336, 340 and 345	
— v. Whitby -	432, note
— d. Castle v. White, 620,	
note	
— Haslewood v. Pope, 619,	
note	
Gore v. Knight -	29, note
Gott v. Atkinson	26 and 250, note
Grave v. Lord Salisbury, 417, note,	
433, note	
Gray v. Minnethorpe -	429, note
Grayson v. Atkinson, 132, 133, 135,	
188, 223	
Green v. Howard, 429, note, and	
444, note	
Greene v. Proude -	73, note
Grellier v. Neale and others, 134, note	
Grieves v. Case -	223, note
Griffin v. Griffin -	199
Griffiths v. Vere -	681, note
Grimmett v. Grimmett, 223, note,	
224, note	
Gulliver v. Ashby -	573, note

INDEX OF CASES.

XV

H.		PAGE			PAGE
Habergham v. Vincent,	72, note, 75,		Hinton v. Pinke	-	355, note
	76, 77, 80		Hitchens v. Bassett,	264, note, 265,	266
Haldemand v. Hudson	523, note		Hixon v. Oliver	-	631, note
Haines v. Haines	383		Hoare v. Parker	-	542, note
Hales v. Petit	33, note		Hodgkinson v. Wood	-	269
Hamilton v. Worley	86, note		Hodgson v. Ambrose	-	431, note
Hanson v. Graham	432, note		—— v. Lloyd	-	416, note
Hannis v. Packer	81, note		Hogan v. Jackson	-	620, note
Harding v. Glyn	444, note		Holden v. Smallbrook	-	48
Harkness v. Bayley	271		Holderness (Lady) v. Marquis of Carmarthen	-	90
Harland v. Trigg	429, note		Holdfast and Woollams v. Clapham,		327, note
Harmood v. Oglander,	277, note,		Holford and others v. Otway,		291
	334, 335, 336, 337, note		Holloway v. Holloway		429, note
Harper v. the Bailiffs of Derby,	324		Holmes v. Coghill	-	494
Harris v. the Bishop of London,	471, 475		Hone v. Medcraft,	355, note, 358	
—— v. Ingledew	685, note		Hooley v. Hatton	-	439, 443
Harrison v. Harrison,	129, 130, 131,		Hoyle v. Clarke	-	255
	524, note		Humphries v. Taylor	-	381
Harwood v. Goodright	301		Hunt v. Hort	-	467
—— v. Wallis	408, note		Hussey v. Grills	-	42
Hartop v. Whitmore,	417, 426, note		Hyde v. Hyde	-	88, 367
—— v. Hoare	542, note				
Hatcher v. Curtis	392, note, 393				
Havergill v. Hare	331, note				
Hawes v. Wyatt	282, note				
Haynes v. Mico	423, note				
Hearle v. Greenbank,	108, 111, 113,				
	114, 116, 117				
Hedger v. Row	247, note				
Hedges v. Hedges	12, note				
Hele v. Bond	279 and 392, note				
Herbert v. Turbal	481, note				
Hereford (Bishop of) v. Adams,	216, note				
Heylin v. Heylin	144, note				
Hick v. Mors	281, note, 283				
Hindon v. Kersey,	157, note, 159,				
	161, 187				
Hill v. Simpson	673, note				
Hilliard v. Jennings	156, note				
Hilton v. King	122, note				

I. J.

Jackson v. Hurlock	-	405
James v. Dean	-	358 and note
—— v. Greaves	-	385, note
—— v. Siemens	-	437
Jefferey v. Hicks	-	327, note
Jeffreys v. Jeffreys	-	355, note
Jenkin v. Whitehouse	-	393, note
Jenkins v. Jenkins	-	114
Jones v. Beale	-	445, note
—— v. Clough	-	63, 65
—— v. Parsons	-	631, note
—— v. Colbeck,	431 and 468, note	
—— v. Lake,	172, 174 and 176, note	

K.		PAGE			PAGE
Kelly v. Paulett	-	444, note	Low v. Burron	-	49
Kennell v. Abbott	-	385, note	Lowe v. Jolliffe,	180, 182, 185	
Keeper v. Henley	-	232	Luther v. Kidby,	339, 340, 341,	
Kidney v. Coussmaker	-	248, note		342, 344, 345, 346, 347	
Rightley v. Rightley	-	684, note	Lugg v. Lugg	-	395, 406
King v. King	-	686, note	Lytton v. Lady Falkland,	482, note,	
Knollys v. Alcock	-	317, 347		485, 490, 492	
Knotsford v. Gardiner	-	619, note			
<hr/>			<hr/>		
L.			M.		
Lambe v. Parker	-	269	Macey v. Shurmer	-	686, note
Lamplugh v. Lamplugh	-	428, note	Macnamara v. Jones	-	686, note
Lane v. the Earl of Stanhope,		119, note	Maddison v. Andrew	-	632, note
— v. Goudge	-	432, note	Mahon v. Savage	-	446, note
— v. Wilkins	-	494	Mariot v. Kinsman	-	393, note
Langham v. Henny	-	71, note	Marlborough (Duke of) v. Lord Go-		
Larkins v. Larkins,	377, 378, 381		dolphin,	391, note, 428, note	
Lashmer v. Avery	-	327, note	Mason v. Day	-	350, note
Lawson v. Lawson	-	13, note	— v. Hyde	-	196
Lea v. Libb,	142, note, 143, note		Masters v. Masters	-	78, 470
Leach v. Meeklem	-	429, note	Marwood v. Turner	-	286, 348
Lechmere v. Lord Carlisle,	422, note		Matthews v. Matthews	-	434, note
	423, 425		Matthews v. Warner,	197, note, 202,	
Ledsome v. Hickman	-	633, note		note	
Lee v. D'Aranda	-	421	May v. Lewin	-	448, note
Leeds (Duke of) v. Munday,		105, note	— v. May	-	239, note
Lemayne v. Stanley,	122, 125, 126,		Maybank v. Brooks	-	447
	128, 131, note		Middleton v. Crofts	-	69, note
Lepcot v. Brown	-	456, note	Miller v. Miller	-	12, note
Lestrangle v. Temple	-	343	Milnes v. Slater	-	432, note
Limbery v. Mason	-	197, 258	Mog v. the President of Bath Hospi-		
Lindop v. Eborall	-	619, note	tal	-	246
Long v. Blackall	-	681, note	Moggridge v. Thackwell	-	214, note
Long v. Stewart	-	524, note	Mole v. Thomas	-	371, note
Longdon v. Simpson	-	681, note	Molton v. Hutchinson	-	7, note
Longford v. Eyre	-	62, 167, 186	Molyneux v. Scott	-	430, note
			Montague v. Jeffrys	-	269
			— v. Jefferys Moor,	259, note	
			Moore v. Moore	-	541, note
			Morice v. Bishop of Durham,	216,	
				note, 231, 429, note	
			Morshead v. Frederick	-	408, note

		PAGE			PAGE
N.					
Nab v. Nab	-	208	Partridge v. Partridge	-	354, note
Nannock v. Horton	-	297, note	Peate v. Ougley	24, 27, 138, 140	
Needler v. Bishop of Winchester,		324	Peck v. Halsey	-	559, note
Negus v. Coulson	-	221, note	Pemberton v. Pemberton	-	375
— v. Coulter	-	89, note	Pendock v. Mackinder	-	150, note
Newton v. Preston	-	274, note	Perry v. Whitehead	-	635, note
Nicholas v. Simmonds	-	321	Philips v. Garth	429, 445, note	
Nicholls v. Judson	-	434, note	Phillips v. the Parish of St. Clement Danes	-	205, note
Nisbett v. Murray	-	449, note	Phipps v. Earl of Anglesea	-	273, note
Norden v. Griffiths,	328, note, and	329 and note	Pierson v. Garnett	-	429, note
Norris v. Cubitt	-	397	Pigott v. Waller	-	491
Nourse v. Finch	451, 452, 454		Pike v. Badmering	-	180
Noys v. Mordaunt	110, 111, 114		Pistol v. Richardson	-	119, note
Nugent v. Gifford	-	673, note	Plunket v. Penson	-	247
<hr/>			Pomfret (Earl of) v. Lord Windsor	-	242, note
O.			Powell v. Cleaver	-	188
Ogle v. Cook,	188, note, 339, note		Powlett v. Herbert	-	524, note
Oke v. Heath	-	394	Price v. Lloyd	-	156, note
Oldham v. Pickering	-	58	Prince v. Stebbing	-	422, note
Onyons v. Tyrer	259, 261, 366, 373, 376, 382		Purefoy v. Rogers	-	402
Osborne v. Duke of Leeds,	438, note		Purse v. Snaplin	354, note, 431, note	
<hr/>			Pym v. Blackburn	-	467, note
<hr/>			R.		
P.			Rachfield v. Careless	448—449, note, and 450, note	
Parke v. Mears	-	134, note	Radnor (Earl of) v. Shafto	430, note	
Parker v. Ashe	-	378	Ragget v. Clarke	-	47, note
— v. Bleake	-	327, note	Rawlins v. Jennings	-	540, note
Panphrase v. Lord Lansdown,	481, 486, 490, 592		Reade v. Reade	-	430, note
Parry v. Hodgson	-	241	Read v. Snell	-	432, note
Parsons v. Parsons	458, 466, note		Reid v. Shergold	-	392, note
— v. Freeman,	305, 312, 341, 342, 344		Rex v. Corneforth	-	239
— v. Lance	396, and note, and 401 note, 698 note		— v. Crosby	-	151, note
— v. Pierce	-	325	— v. Ford	150, note, 151, note	
<hr/>			Rich v. Beaumont	-	415, note
b			Richardson v. Greese	434, note, 435	
			— v. Elphinstone	423 note	
			Rider v. Sir C. Wager	316, 418, note	
			Ridout v. Earl of Plymouth	246 note	

	PAGE		PAGE
Ridges v. Morrison,	438, 439, 440, 441	Shepherd v. Shepherd	405, and note, 409, note, 410
Right v. Price	125, 168, 252	Shove v. Pincke	- 277, note
Ripley v. Waterworth	59 and 61	Shudall v. Jekyll	426, note, and 433
Risley v. Lady Ballinglass	339	Smart v. Prujean	- 75, note
—— v. Baltinglass	- 343	Smith v. Casson	- 13, note
—— v. Temple	- 169	—— v. Codron	- 132
Roach v. Hammond	444, note	—— v. Coney	- 466, note
—— v. Popham and others	442	—— v. Evans	- 126
Roberts v. Kiffin	- 431, note	Snellgrove v. Bailey	13, note
Robinson v. Hardcastle	392, note	Snowden v. Snowden	423, note
—— v. Taylor	- 522, note	Southey v. Somerville	560, note
Robert v. Morgan	- 71, note	Stafford v. Buckley	- 89
Roe v. Jones	- 296, note	Stansfield v. Habergham	72, note
—— d. Conolly v. Vernon,	619, note	Stead v. Bouvrier	- 47, note
—— Child & Ux. v. Wright,	<i>ibid.</i>	Stephens v. Gerrard	- 21
Roper v. Radcliffe	259, note, 280, note	Stewart v. Marquis of Bute	541, note
Rose v. Bartlet	- 118	Stile v. Chapman	12, note, 13, note
Rosewell v. Bennett	426, note	Stirling v. Lydiard,	353, 358, note
Ross v. Ewer	27, note, 139, 140, and 394, note	Stokes v. Moor	- 123
Royden v. Malster	- 35, note	Stone v. Forsyth	- 29, note
Rudstone v. Anderson	353, 357	Stonehouse v. Evelyn	132, 140
Rumbold v. Rumbold	431, note	Stowell v. Lord Zouch	- 326
Rutland (Duke of) v. the Duchess of Rutland	450, note, and 454	Strange v. Barnard	- 131
<hr/>		Streatfield v. Streatfield	- 114
S.		Strong v. Teate	- 430, note
Sansbury v. Read	- 631, note	Spark v. Purnell	- 428, note
Sanderson v. Walker	523, note	Sparrow v. Hardcastle	281, note, 286, note, 287, 288, and 336
Savile v. Blacket	- 418, note	Spinks v. Robins	- 434, note
Sayle v. Freeland	- 70	Sympson v. Hornsby	- 484
Selby v. Wood	- 449, note	<hr/>	
Selwyn v. Selwyn	328, 329, note, and 330	T.	
Seymour et Ux. v. Rixworthy	264	Tate v. Hibbert	- 13, note
Shaftsbury (Lord) v. Harman	239 note	Temple v. Webb	- 343
Shargold v. Shargold	12, note	Teynham (Lord) v. Webb,	518, 631 note
Shalter v. Friend	- 195, note	Thelluson v. Woodford	431 note, 679 note
Shallcross v. Finden	- 685, note	Thomas v. Bennett	- 434, note
Sheddon v. Goodrich	82, 84, 86, 87, 118, note	—— v. Evans	- 390
Shephard v. Lutwidge	- 266	—— v. Hoole	- 445, note
		—— v. Thomas	461, 462

INDEX OF CASES,

xix

	PAGE
Tickner v. Tickner	306, note, 341, 342, 343, note, 344, 345, 346, 347
Tofield v. Tofield	- 685, note
Took v. Glascock	- - 47, note
Toone and West v. Copestake	225, note
Townsend v. Ives	- 187
----- v. Pearce	256, note
Trimmer v. Bayne	453, 454, 455, 456
----- v. Jackson	25, 27, 140
Tuffnel v. Page	38, 43, 44
Turner v. Kett	- 447, note

U. and V.

Ulrick v. Litchfield	- - 469
Urquhart v. King	- 449, note
Vanderzee v. Aclam	395, note
Vaughan v. Farrer	- - 228
Verhorn v. Brewen	- - 206
Vernon (Lady) v. Jones	339, note
Villiers v. Villiers	- - 95, note

W.

Wagstaff v. Wagstaff	37, 63
Wallis v. Wallis	25, note, 27
----- v. Hodson	- 403, note
Walpole v. Lord Cholmondeley	389, note
----- v. Lord Oxford	388, 389
Ward v. Phillips	- - 404
----- v. St. Paul	- 239, note
Warde v. Warde	- - 303
Waring v. Ward	- 86, note
Warneford v. Warneford	126
Warren v. Hawell	249, note

	PAGE
Watts v. Fullarton	305, 311, 312, 313
Wells v. Wilson	- - 409
Westfaling v. Westfaling	54, 58, 250, note
Weyland v. Weyland	422, note
Whale v. Booth	- 673, note
White v. Barber	- - 403
White v. Evans	- 448, note
Whitechurch v. Whitechurch	90
Whithorne v. Harris	444, note
Whitmore v. Lord Craven	431, note
----- v. Trelawney	430, note
Widmore v. the Governors of Queen Anne's bounty	- 214, note
----- v. Woodroffe	223, note
Wilcocks v. Wilcocks	- 421
Wild v. Holtzmeyer	- 519
Williams v. Jekyl	- - 54
----- v. Chitty	- 684, note
----- v. Jones	- 449, note
----- v. Owen	306, 307, 311, and note, 335
Willoughby v. Willoughby	98
Winn v. Littleton	105, note
Wilson v. Morent	- 431, note
----- v. Pigott	- 422, note
Woods v. Huntingford	86, note
Woodward v. Lord Darcey	473, note
Wright v. Cadogan	- - 29
----- v. Walthoe	- - 197
Wyndham v. Chetwynd	157, note, 161
Wynn v. Williams	- - 520

Y.

Yarmouth (Mayor of) v. Eaton	89, note
Young v. Young	- 408, note

TABLE

OF THE

STATUTES CITED.

	PAGE		PAGE
7 Edward I, st. 2	211	29 Charles II, c. 3,	22, 24, 27, 53,
13 Edward I, c. 32	<i>ibid.</i>		55, 57, 58, 250, 251, 479
29 Edward II, c. 3	213, note	3 & 4 William and Mary, c. 14,	242
18 Edward III, st. 3, c. 3	<i>ib. note</i>	4 William and Mary, c. 2	7, note
45 Edward III, c. 26	212, note	5 William III, c. 21, sect. 6	209
15 Richard II, c. 5	211	7 & 8 William III, c. 37	213
9 Henry VI, c. 25	404	10 & 11 William III, c. 16	403, note
4 Henry VII	298, note	11 & 12 William III	221
21 Henry VIII, c. 4,	521, note,	2 Anne, c. 16	204
	522, note	2 & 3 Anne, c. 5	7, note
27 Henry VIII, c. 10	15	2 & 3 Anne, c. 11	213
32 Henry VIII, c. 1, 16, 47, 53,	212, 295, note, 478	4 Anne, c. 16	242
34 Henry VIII, c. 5, 38, 47, 53,	note, 212, 295, note, 298, note, 447, 478	11 George I, c. 18	7, note
5 Elizabeth, c. 9	151	9 George II, c. 36	216
43 Elizabeth, c. 4	212, note	9 George II, c. 86	226
43 Elizabeth, c. 9	230	14 George II, c. 20	47, 53, 56, 58
43 Elizabeth, c. 14	213	25 George II, c. 16	156, 161
12 Charles II, c. 24, 17, 233, 234,	237, 238, 251, 261, note	31 George II	161
		5 George III	<i>ibid.</i>
		26 George III, c. 63	210
		31 George III, c. 35	150, note
		32 George III, c. 34	210
		33 George III, c. 28, s. 14	61, note
		35 George III, c. 14, s. 16,	<i>ibid.</i>

A
TREATISE
ON
WILLS AND CODICILS:

CHAP. I.
OF MAKING AND PUBLISHING WILLS.

PART I.

Progress of the Law.

ALIENATIONS to take effect after death, can only be the practice of an advanced period in the progress of society; after the hand that held and maintained the possession is withdrawn, to permit the will of the proprietor to direct the succession, implies a conception of the sacredness of property, and a state of order and security which does not exist in the beginnings of nations (1). It appears

(1) *Omnino rationi naturali repugnat, alicui jus esse statuendi de rebus suis ita, ut voluntas post mortem valere incipiat; ubi jam velle desiit et mors omnia solvit. Hert. Elem. Polit. pars 2. sect. 11. § 53. Vid. Vinn. Comm. tit. de test. ordin.*

doubtful whether, among the Romans, before the introduction of the laws of the twelve tables, or among the Athenians before the legislation of Solon, the direct testamentary disposition even of moveables was allowed; and among the ancient Germans it appears that the children succeeded to the possessions of the parent, and that he had no power to alienate them by his will. If he had no children, the steps in the order of inheritance and succession were the *patres patru avunculi* (2).

Progress of the
testamenti factio,
in the Roman
jurisprudence.

(2) The succession to the heirs of the body, and in case of the defect of such representatives, to the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind. The suggestions of a common feeling appear, therefore, to have made this an universal rule of transmission, and to have established it in communities widely separated by time and place. Thus the representation in the channel of blood and proximity seems to have had its foundation higher than any positive institutions, though to positive institutions we must of course refer the *modifications* of this rule of succession; which, indeed, has been so variously ordered, that no two nations exactly resemble each other in their institutions regarding it.

That the right of controuling this succession by the private will of the possessor, was the product of an improved period of legislation, there is much concurrent testimony to shew. Till the legislation of Solon, the Athenians did not possess this privilege, as it appears from many authorities, particularly from Plutarch, in his life of Solon, page 196, edit. Bryan, and the orations of Isæus, especially *de P.M. loctemonis Hereditate*; nor according to Selden *de Success de bon. Hebr. c. 24.* did it exist among the ancient Jews; nor as we learn from Tacitus *de mor. Germ. c. 20*, among the Germans in his day. The tenderness which continued to prevail among the Romans for the legal heir is strongly displayed in their provisions by the laws

PART I.

Progress of the Law.

If the power of disposing of land by will was exercised by our Anglo-Saxon ancestors, it seems

Furia, Voconia, and Falcidia, and more pointedly perhaps by their remedy of *querela inofficiorum testamenti*, wherever a will was made against the order of natural affection, without reasonable cause.

With respect to the question how far the right of disposition by will existed among the Romans, before the laws of the Twelve Tables, there seems to be much variety of opinion. The text of Justinian propounds the order in which the form of the *testamenti factio* proceeded, which the student will consult, with pleasure, in the Commentary of Vinnius, edited, with notes, by Heineccius, in the title *de Testamentis Ordinandis*. It appears that the most ancient mode of making a testament, among the Romans, was, by converting a man's private will into a public law, for such seems to have been the object and intention of the promulgation or celebration of a testament in the *calatis comitiis*, i. e. in the presence of the Roman people summoned before the Sacerdotal College *per curias*. And, according to Heineccius, these assemblies were not convened specially for the purpose of giving sanction to wills, *sed legum ferendarum magistratuumque creandorum causa immo et ob alia negotia publica, bellum, pacem, judicia, &c.*

Thus was this private disposition by testament of the property of an individual promulgated and ratified in the same manner as a public law; and for this reason the *testamenti factio* has, in the text of the imperial law, been said to be *non privati sed publici juris*, *D. 28. c. 3.* and again by Ulpian, it is said, *legatum est, quod legis modo—testamento relinquitur*, *Ulp. tit. 24. § 1.*

Another form of testament which existed antecedently to the laws of the Twelve Tables, was that called *testamentum procinctum* or *in procinctu*, which was the privilege only of those who were on the eve of going to battle, or *girt* for the war, with the uncertainty on their minds of their ever returning, and was among the immunities in regard to property conferred by the Romans upon the defenders of their country.

But as the *comitia* were held but twice a year, so that a man might be surprised by sickness without having the opportunity of thus solemn-

much less likely, that it originated with themselves, than that they adopted it from those laws which

nizing his last will, and the attendance upon these public assemblies was often difficult or impossible to the aged and infirm; and furthermore, as women were by these forms precluded from making any testament, as not having any communion with these *comitia*, according to Gellius, lib. 5. c. 19, a third method was struck out, which might facilitate the ultimate disposal of private property to all descriptions of persons, otherwise competent; and this last method was called the *testamentum per as et libram*, which was a fictitious purchase of the family inheritance or heirship, by money weighed in a balance, and tendered by the intended inheritor to the testator, before witnesses.

Thus it is said to be *imago vetusti moris in venditione atque alienatione rerum Mancipi, quæ uno verbo, Mancipatio dicitur, nimirum ut is in quem hæ res transferebantur, eas emeret domino ære et libra, apprehenso ei vixis hæc nummo uno.* And it seems that this fictitious proceeding was still retained after the promulgation of the law of the Twelve Tables had authorized the making of wills by the clause of *paterfam. uti legassit &c. ita jus esto*; for it was still regarded as necessary, to raise the will of a private man to a level with the laws of the state, that it should take the shape of a strict legal transaction *inter vivos*; for *testandi de pecunia sua legibus certis facultas est permessa, non autem juris dictionis mutare formam, vel juri publico derogare cuiquam permissum est. C. 6. 23. 13.* The two former methods, by the *testamentum in procinctu*, and *calatis comitiis*, were thrown into total disuse, by the *testamentum per as et libram*; but this last form of willing again made way for others of a more convenient description.

The methods above-mentioned were referible to the *jus civile*, or as we express it, the law of the land; but from the edict of the prætor, other forms at length were brought into practice, by virtue of which *jus honorarium*, the *mancipatio*, and the weighing and delivering of money, were dispensed with, and, in their stead, the solemnity of signing by seven witnesses, was introduced; the presence only and not the signature of witnesses being necessary by the *jus civile*.

the Roman government had established and left standing in this country. It appears, however,

At length, however, by gradual use and progressive alterations, as the text of Justinian informs us, the *lex prætoria* and the *jus civile* were, in some degree, incorporated; and a compounded regulation took place, whereby it became requisite to the valid constitution of a will, that the witnesses should be present (the presence of witnesses being the rule of the *jus civile*); that they and also the testator should sign, according to the superadded institution of positive law; and lastly, that in virtue of the prætorian edict, their seals should be affixed, and that the number of witnesses should be seven.

Afterwards, the further solemnity of naming the heir in the testament was added by Justinian, and again taken away by the same emperor, in Nov. 119. c. 9. and at length, the excess of testimony was corrected by the canon-law in the pontificate of Alexander the Third, by which it was declared sufficient to prove a testament by two or three witnesses, the parochial minister being added; *improbata constitutione juris civilis de septem testibus adhibendis ut nimis longe recedente ab eo quod scriptum est—in ore duorum vel trium testium stet omne verbum*, Swinb. 64. Deut. c. 18. Matth. c. 18. which reformation obtained the sanction of general usage.

Swinburn says, that this institution has also been reformed by the general custom of this realm, “which distinctly requires no more than two witnesses, so they be free from any just cause of exception;” which observation he repeats in several places of his treatise on wills, on the authority of Linwood, in *Statut. Verb. Prob. de Test. l. 3. Provincial Constit. Cant.* Bracton also has the following passage: “*Fieri autem debet testamentum liberi hominis ad minus coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis ad hoc specialiter convocatis, ad probandum testamentum defuncti si opus fuerit, si de testamento dubitatur.*” Bract. lib. 32. fol. 61. but these words import a recommendation, and not an imperative rule; and nothing seems now to be better understood, than that a will of personalty needs neither the attestation of witnesses, or the testator’s seal or signature; and though written in another hand, yet if proved to

pretty certain, that this testamentary power over land did not survive the Norman conquest, except in particular cities and boroughs, where, by particular favour, the Saxon institutions were suffered to breathe (2): it ceased by the operation of the feudal system of property, which necessarily excluded all voluntary alienations of possessions with which personal services and duties were inseparably connected^a. But with respect to moveables, the testamentary power seems, in this country, with more or less restraint, to have been exerciseable in a very remote period. The ready mode of authenticating the property in goods by the possession, and of transferring the possession by manual delivery, and the usufructuary and revocable quality of terms of years, caused them at an early period to be considered as proper subjects for every kind of alienation. But though testaments of moveables were permitted by the ancient law of England, according to Glanville and Bracton, yet the power extended only to one-third, called the dead man's part; which limitation seemed to prevail in London and York, after it had fallen into disuse in other parts of the kingdom, till at length by several statutes the

^a Vide 1 Eq. Ca. Abr. 401,

have been written according to the testator's instructions, and approved by him, it is a good will to dispose of chattels. Comyns, 452, et seq.

(2) Whether gavelkind lands in Kent were deviseable by custom seems to be a matter in dispute. See the arguments *pro et con.* in Rob. Gavel, 235,

testamentary power over goods was thrown generally open (3).

According to the author of the Commentaries, "by the ancient common law of the land, and which continued at the time of Magna Charta, a man's goods were to be divided into three parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might dispose of one moiety, and the other went to his children. If he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without wife, or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum*, was given to recover them.

In the reign of Edward the Third, this right of the wife and children was still held to be the common law, though frequently pleaded as the local custom of

(3) By the 4th W. and M. c. 2. persons within the province of York may dispose by will of all their personal estate, in as large and ample a manner as within the province of Canterbury, and elsewhere; and the widows and children, and other kindred of such testator, are barred of their claims under the custom. But the citizens of the cities of York and Chester, who were freemen, inhabiting there, being excepted out of this statute, the 2d and 3d Anne, c. 5, was made to repeal this exception, and to put them upon the same footing, in this respect, as persons within the province of York. And by the 11th G. 1. c. 18, the citizens and freemen of the city of London are also enabled to devise and dispose of their personal estate, in

Restraints upon the testamentary power by the customs of York and London, removed by statutes.

Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly to be the general law of the land,^b in the reign of Charles the First. But the law has since been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though it would be difficult to trace out when this alteration began^b.” (4)

^b 2 Bl. Com. 491. 2.

such manner as they shall think fit, except where they enter into any agreement on marriage, or otherwise, that their personal property shall be subject to or distributed by the custom. In cases of intestacy, the property becomes subject to, and distributable according to the custom.

Of the power of bequeathing legacies in the different stages of the Roman law.

(4) This difference in importance between land and goods arose out of the principles of the feudal system. According to the law of Rome, no such difference subsisted. The general representative was the heir, and by that title he succeeded as well to the moveables as immoveables. And when the *whole* substance devolved, the difference was only between him who was appointed heir by the will, and was called the *heres institutus*^{*}, and him who succeeded to the intestate as his natural heir. It has been endeavoured, in a preceding note, to help the student to understand the nature of this appointment of an heir, by will, in the law of Rome, before and after the law of the Twelve Tables, by the clause “*uti quisque legassit, &c.*” (which was construed to comprise the *heredum institutiones*, as well as the *legata*) confirmed the general testamentary power. A slight summary of the practice and forms of bestowing particular parts of a man’s possessions by way of legacy, under the different stages of the Roman law, may perhaps be not unacceptable.

^{*} If of the goods only, he was called *heres testamentarius*; and it was shewed by Lord Hardwicke that *executor* was a barbarous term unknown to the civil law; 3 Atk. 300.

With respect to land, the feudal system was long in giving way to the encreasing propensity of

The *legata et fidei-commissa* were the two modes whereby the testamentary disposition of property in *particular* things was effected; in contradistinction to a gift of the universal inheritance or substance of the testator; in the disposal whereof, and in the institution or appointment of the universal heir, consisted properly the *testamentis factio*.

Another very important distinction between the *hereditas ex testamento* and the *legatum* was this—that the latter was purely lucrative, whereas the former was often burthened with obligations, and sometimes to such an extent as to be thereby rendered unprofitable. By the text of the imperial law, the legacy or *legatum* was defined to be “*donatio quedam a defuncto relicta, ab herede præstanda*,” and great stress was laid by the commentators on the word ‘*quedam*,’ as importing something having the quality of a gift in *some* respects, and yet essentially differing from it in *others*. A gift they said it could not be, because a gift was properly a transaction between two persons, and requiring for its perfection the acceptance of the donee.

A legacy did not depend upon the acceptance of the legatee, nor was it a transaction between two persons; it was the creature of the testator’s will only, ambulatory and suspended during his life. In a strict sense, indeed, it was considered as expecting the acceptance or assumption of the inheritance by the heir, with the function belonging to it; *post mortem testatoris adhuc pendet ab additione hereditatis*. And yet it was *quedam donatio*, as proceeding from the benevolence of the testator, and conferring a title of emolument only—*titulus, mere lucrativus*. The latter words of the definition ‘*ab herede præstanda*,’ are to be understood as implying, that, although the *property* in the thing bequeathed passes directly to the legatee, the *possession* was nevertheless to be looked for at the hands of the heir.

We learn from Justinian’s Institutes, *tit. de legatis*, what were the ancient methods and forms of bequeathing, which, by their strictness and technicality imposed great difficulties upon, and sometimes disappointed the wishes of, the testator. These various forms

individuals to make provisions that were to take place after death. It seems, however, that with the

gave a diversity of rights and remedies to the legatary, and were of unequal efficacy in respect to the disposing power of the testator: as for example, by one form a testator could dispose only of what was already his own property, by another, he could dispose of the possessions of other men, provided they were saleable, as far as his assets in the hands of the heir would suffice for the purchase: some gave a right of action in *rem*, and some in *personam*. These and other particulars respecting them, the reader will find well explained in the Commentary of Vinnius, *tit. de legatis*. The enquiry is, however, only a matter of curiosity, as Justinian, by a sensible law, reduced these various forms to one and the same operation.

But as the general strictness belonging to them all still remained, though the intricacy of distinction between them was removed, the same Emperor, by a stroke of liberal policy, levelled the distinction in point of *effect*, between the *legata* and the *fidei-commissa*, and thereby, the rigid forms of expression, the necessity of the previous appointment of an heir, the testator's inability to extend the benefit beyond the life of the heir, or to bequeath it by an instrument less solemn than a regular testament, or codicil confirmed by a testament, were all removed, and the same indulgence given to the bequest by way of *direct legacy*, as to that which was effected through the medium of a *trust*.

In virtue of this ordinance, and in prosecution of its spirit, a more liberal interpretation obtained in the construction of testaments, in which from thenceforward the intention of the testator was the principal object of enquiry, and a numerous description of persons whom the rigour of the *jus civilis* had deemed incapable of taking by way of *legacy*, such as the banished, the childless, persons living in celibacy, and strangers, were rendered capable of taking by will, and the circuitry and precariousness of a trust were avoided; and, on the other hand, to equalize the advantages respectively belonging to the *legata* and the *fidei-commissa*, instead of the extraordinary and sometimes dilatory process by which the *fidei-commissa* were enforced, the ordinary remedy by the *actio ex testamento*, and even the *rei vi-*

consent of the superiour, the feudatory often contrived to alienate by a donation by deed, made on the

dicatio, in the cases where it applied, were opened to all descriptions of legataries.

The *donatio causâ mortis* is a title of the civil law, and of our own, to which the attention of the diligent student should be directed. In the text of the Institutes of Justinian, lib. 7, it is thus defined, or rather described: *Mortis causâ donatio est, quæ propter mortis sit suspicionem: quum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accipit: sin autem super vivisset is qui donavit, reciperet: vel si cum donationis penitusset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatarum redactæ sunt per omnia. Nam cum precedentibus ambiguum fuerat, utrum donationis, an legati instar eam obtinere oporteret, et utriusque causæ quedam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur, et sic procedat, quem ad modum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, quum magis se quis velit habere, quam cum, cui donat, magisque cum, cui donat, quam heredem suum:* which description the Emperor illustrates by an example from the Odyssey, of the gift of Telemachus to Piræus (see also other examples of the antiquity of this species of gift in Taylor's Elements of the Civil Law, p. 536-7.)

According to Vinnius, in his Commentaries on this description of the *donatio causâ mortis*, it is not necessary to the constitution thereof, that the giver should be in actual and imminent danger of death, but it is enough if he be moved by the general consideration of mortality, *sola cogitatione mortalitatis ex sorte humana*, provided he expressly declares at the time, that he gives with such expectation and intention, otherwise the gift will be construed a pure and simple *donatio inter vivos*, and, consequently, will not be revocable. The same account of it is given by Swinburn, in the seventh section of his Treatise on Testaments and Wills. But in our courts of equity, the description of this species of donation has been confined within narrower bounds, being limited to those cases where a man lying in extremity, or being surprised with sickness, and having no

bed of death, *mortis causa*; which, being a gift to take effect in point of form, *de presenti*, though its

opportunity to make his will, lest he should die before he can make it, gives with his own hands, his goods to his friends about him. This, says Lord Cowper, if he dies, shall operate as a legacy, but if he recovers, then the property thereof reverts to him." See Gilb. Eq. Rep. 12, 13. Prec. in Chan. 269; and see 3 P. Wms. 358. 1 P. Wms. 405. 442. 1 Vez. jun. 547. The reader, however, will find in *Still v. Chapman*, 2 Bro. C. R. 612. a decision of Lord Thurlow on this subject, conformable to the explanation given in Vinnius and Swinburn, as above-mentioned.

It appears quite clear, according to all the authorities, that there must be a delivery of the thing by the giver in his life-time; and we observe, that Lord Cowper's expression, in the case of *Hedges v. Hedges*, 3 Prec. in Chan. 269; was "gives with his own hands." And, by Lord Hardwicke, in the case of *Shargold v. Shargold*, 2 Vez. 431, it was said, that the delivery must be *actual*, and that a *symbolical* delivery would not do; for which reason his Lordship held, that a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in contemplation of death, was not a good *donatio mortis causa*; consequently, said his Lordship, this was merely legatory, and amounted to a nuncupative will, and was contrary to the statute of frauds; for if the necessity for delivery be taken from the thing, it remained merely nuncupative.

Upon the same ground, his Lordship held that it was impossible to make a donation *mortis causa* of stock or annuities, because in their nature they were not capable of *actual* delivery; and that, therefore, there could not be a gift *causa mortis* of them, without a *transfer*, or something amounting to a transfer. And upon the same principle it was judged, in *Miller v. Miller*, 3 P. Wms. 356, that a note for 100l. being merely a chose in action, could not be the subject of a *donatio causa mortis*.

But still, perhaps, if such a delivery be made as, in gifts *inter vivos*, would actually transfer the property in the thing, and give the possession in law, this will be a sufficient delivery to support the

real effect was postponed to the death of the grantor, might introduce this ambiguous kind of

act as a *donatio mortis causâ*; for the nature of the thing must be respected in all transfers. Thus in the case above cited, of the gift of the receipts for S. S. Ann. it seemed to be admitted by the Chancellor, that the *transfer* of the stock itself would have been effectual. And, perhaps, Lord Hardwicke designed in the case above cited to deny the efficacy of a *symbolical* delivery only where the thing was susceptible of a *specific* and *manual* delivery. The decision of *Lawson v. Lawson*, 1 P. Wms. 441, wherein a man upon his death-bed had drawn a bill upon a goldsmith, to pay 100l. to A.'s wife to buy mourning, is an instance of an effectual appointment in the nature of a *donatio mortis causâ*; and see *Tate v. Hilbert*, 2 Vez. jun. 111, wherein that decision was approved by Lord Loughborough; his Lordship, at the same time observing, that the report in 2 P. Wms. was incorrect, as it appeared from the Register's book that the direction for mourning was indorsed upon the bill, in the donor's hand-writing. It will be seen also by the cases of *Still v. Chapman*, 2 Bro. C. R. 612, and *Snellgrove v. Bailey*, 3 Atk. 214, that both bank notes and even bonds have been held to be capable of a sufficient delivery to constitute a good *donatio causâ mortis*.

The principal circumstances which distinguish the *donatio mortis causâ* from the *proper legacy*, should be attended to. The points also of resemblance should be carefully marked. And principally, on this head, the ambulatory, imperfect, and revocable nature of both will occur as the most important article in which they agree; and on the other hand, the principal difference between them, seems to consist in the independence of the title of the donee of the gift *causâ mortis*, on the act or consent of the representative. The same grounds of difference distinguished them in the civil law, *donatio hæc ab additione hereditatis, sicut legatum non pendet, sed sola morte confirmatur donantis*. It should be observed also, that a *donatio causâ mortis* differs from a legacy in its exemption from the jurisdiction of the ecclesiastical courts, 2 Vez. 437; and again resembles it in its liability to debts upon a deficiency of assets; see *Smith v. Cason*, at

testamenti factio, with less novelty of principle^c. It seems, indeed, that the consent of the heir was, at first, and for a long continuance, thought necessary to these alienations by deed, in prospect of death; though, according to some writers, this practice was worn out before the statutes of Henry the Eighth^d. It seems, that soon after the statute of *quia emptores* had concurred with other causes, to render the testamentary power over land as well as moveables an object of universal desire, the difficulty arising

^c Glanv. lib. 7. c. 1.

^d See Dal. on Feuds, c. 3. sect. 1, and Spellman's Remains; also Glanv. l. 7. c. 1.

the end of Drury v. Smith, 1 P. Wms. 406. It is liable to the duties on legacies, imposed by the late acts of parliament; and with the Romans it fell under the restraints of the *lex Falcidia* as well as legacies. They are both liable, according to our laws, to be defeated by creditors.

Finally it may be observed, that the fact of the gift *mortis causâ* is, in our law, to be proved in the same manner as other facts are to be proved; whereas, in the law of the empire, it was a point of resemblance between this gift and a legacy, that the former was necessary to be proved by five witnesses; which was the number necessary to the proof of a codicil, or any instrument of a testamentary operation which was not in strictness a testament according to its definition in the civil law.

If the gift be made and authenticated by a written instrument, without any actual delivery; but the deed or instrument conveys an interest to take effect absolutely in possession at the decease of the donor, this cannot be effectuated as a *donatio causâ mortis*, but there seems to be no reason why it should not operate as a testamentary disposition.

from the necessity of livery of seisin was eluded, by the practice of making feoffments to uses, over which, by the assistance of the courts of equity, wherein declarations and dispositions in respect to these uses were carried into effect, if made upon good consideration, a power of disposing by will might be exercised. And if these creations of uses were adopted from the civil law, we may conjecture that our ancestors were led more easily into the practice, by the notions they had previously learned to entertain of a distinction between the legal and beneficial property, from their reservations of the *dominium directum*, abstracted from the *dominium utile*, in their first feudal donations.

It is well known, however, that by the statute 27 H. 8. c. 10. this method of virtually disposing of land by will was disturbed. For by that statute, the use, as soon as it was created, became the *legal* estate, which was immediately carried to and executed in the *cestui que use*, so that wills lost their operation on the use raised directly upon a feoffment. It was still, however, in the power of individuals to elude the statute, and to keep the legal separate from the beneficial interest, by means of an use raised upon an use, or a second use, which the courts construed to be out of the reach and operation of the act, and thus transferred them to the jurisdiction of equity, under the denomination of trusts. In a very few years afterwards, however, an end was in a great measure put to these artifices,

by the statutes of 32 Hen. 8. c. 1. and 34 Hen. 8. c. 5. usually called the statutes of wills.

By these statutes, all persons having any manors, lands, tenements, or hereditaments, in possession, reversion, or remainder, holden by soccage tenure, or in the nature of soccage tenure, and having no lands held *in capite*, or by knight's service, were enabled to devise all their lands, or any rents, commons, or profits, out of them, to any person, in fee simple, fee tail, for life, or for years, at their pleasure. Those holding of the king *in capite* by knight's service, or by knight's service and not in chief, or of any common person by knight's service, might devise two parts thereof in three, and no more; the other third part being to descend to the heir, for satisfying the duties of the tenure, and, therefore, the devise of the whole land in such a case would be void. The person holding any such land by knight's service *in capite*, and other lands by soccage tenure, might devise two parts of the whole, and no more, or any rent, &c. out of it, at his pleasure. He that held lands of the king by knight's service only, and not *in capite*, as if a mesne lord by knight's service had also other lands held by soccage tenure, might devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his soccage lands at pleasure. But which disposing power was only to be exercised by a will or testament committed to *writing*, in the *life-time* of the testator.

By the conversion of military tenures into common soccage, the statute 12 Car. 2. 24, brought the greatest portion of the lands of this kingdom within the above-mentioned statutes of Hen. 8. and made them disposeable by the last wills of such as possessed them in fee simple. By this statute, which, as the title declares, was "for taking away the court of wards and liveries, and tenures *in capite*, and by knight's service, and purveyance, and for settling a revenue upon his majesty in lieu thereof," all tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by soccage *in capite* of the king, and the fruits and consequents thereof, are taken away and converted into free and common soccage: and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance, at the common law, shall be in free and common soccage, and not by knight's service, or *in capite*.

But the tenure by copy of court roll, and the services incident to the same, are untouched by this act of Charles 2. nor does the statutes of Hen. 8. above-mentioned extend to them, as they do not come within the description of soccage tenure. The tenure in frankalmoign, and the honorary services of grand serjeants, other than of wardship, marriage, and the charges incident to the tenure by knight's

service, were likewise unaffected by this act of Charles*.

The loose construction of the statutes of wills.

It appears, however, that there was something to regret in the almost boundless facility which was given to the testamentary power, by the operation of these statutes; in so much that a celebrated writer has remarked, in speaking of the operation of the statute of wills, that experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law, which are so nicely constructed, and so artificially connected together, that the least breach in any one of them, disorders, for a time, the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person, were allowed to be good wills within the statute,

It appears by the cases upon this statute, that the testament of lands and tenements ought not only to be in writing, but that it must be committed to writing at the time of the making thereof, or at least

* This Act made some alterations also in soccage tenure. It took away the aids *pur file marier*, and *pur faire fitz chevalier*, which were incident to *all* soccage tenures. And it relieved soccage in capite from the burthen of the King's primer seizin, and fines of alienation to the King, to both of which soccage in capite was equally liable with tenure by Knight's service, See Harg. Co, Litt. 93. c. (3).

in the life-time of the testator; and that it is not sufficient to put it into writing, after the testator's death. But if the will be made by parol, and is afterwards written, and then carried to the testator for his approbation, and he approves of it, it is a good will of lands, under the statutes of Henry the Eighth; and it has been held, that if the testator, when he declared his will by word of mouth, had ordered the same to be written, and the will was accordingly written in his life-time, the testament was as good as if it had been written at first. But, if a man were on his death-bed, and another came to him, and asked him whether his wife should have his land, to which he answered, yes, and a clerk being present did put this into writing, without any precedent command, or subsequent allowance of the sick person, this was not a good testament of land, according to the exigency of the statute of wills; and if a man declared his will before witnesses, and sent for a notary to write it, and died before he came, and then it was written, this was no good will of lands, though it would have been sufficient, at that time, as a nuncupative will of chattels.

But if a notary took direction from a sick person for his will, and afterwards went away and wrote it, and then brought it again, and read it to the testator, who approved of it, or if it were written from his mouth by the notary, by the direction of the testator himself, although it were not shewn or read to him afterwards, these were held to be valid dispo-

sitions of land, under the statutes of Hen. 8. And further, it has been held upon these statutes, that if a notary did only take rude notes or directions from the sick man, which he did agree to, and they were afterwards written fair in his life-time, and not shewn to him again, or not written fair till after his death, this was an effectual will to dispose of lands^c.

In the case of *Laurence v. Kete*^f, we have the sentiments of the judges much at large, respecting the sufficiency of a will under these statutes. A. being sick, said that he had devised all his lands to his wife, for life, and limited several remainders of several parcels of them, and about an hour afterwards expressed a wish that one K. were there to write his will, whereupon the wife, without acquainting her husband with it, sent for K. who, from the mouth of the witnesses who heard the devise, wrote the same; but because they differed in their testimony, touching the limitations of the remainders, he wrote two wills, and this without the privity of the husband, who, before the writing was finished, became senseless, and presently afterwards died.

And thereupon the following points were agreed to by the court, and given in charge to the jury: 1st, That an actual devise by word, is no sufficient ground for a stranger to write the will, but there ought to be an actual desire expressed to have the will written, nor is a bare wishing sufficient; there

^c Perk. sect. 476, 477. Dyer, 53. 72. Plowd. 345. 4 Rep. 60.

^f Alleyn Rep. 54.

should be an actual willing. 2. That this desire ought to be expressed in some short space of time after the devise, so that it may be regarded as one continual act; for if the devise be made at one time, and at another time the devisor sends for a person to write his will, a new declaration will be necessary to make it effectual. 3. That an actual desire of the husband that K. were there to write his will, was a sufficient ground for the wife to send for him, though the devisor gave no express directions to do it. 4. That the writing the will from the mouth of witnesses was sufficient, and it need not be from the mouth of the testator. 5. If witnesses agree as to the devise for life, the will stands good for that, though they disagree as to the limitation of the remainders. 6. Though the devisor becomes senseless before the will be written, yet, if it be written before he dies, it is a good will in writing. 7. If a will continue in writing at the time of the death of the testator, though it be lost or burned afterwards, it stands good; but if it be burned at the time of his death, then the devise is void. The next day the jury gave a verdict against the will, because the evidence was not clear as to the testator's desire to send for K. There was a motion for a new trial, upon pretence of partiality in some of the jurors, but the motion did not succeed.

The case of *Stephens v. Gerrard*^s, has been said to have given rise to the clause respecting the signature and attestation of wills in the statute of frauds.

^s Sid. 315. 2 Kebl. 128.

Some loose sheets of paper were there produced as the will of Sir Edward Worsley, and a title was set up under them in favour of his natural daughter: they were written by one Baynham, an attorney of Gray's Inn. Sir Edward had not signed them, and there was no evidence offered to prove them published, but that of Baynham; whose evidence, according to Siderfin, made it appear, that Sir Edward had dictated a writing made by him, and had caused it to be interlined, and had said that he intended to write it over again himself, but that in the mean time what was written should be his will, though he refused at that time to sign and publish it as such; and the conclusion of it as it stood was as follows, "in witness whereof I have put my hand and seal to every sheet," but in fact his hand and seal were not put to any one sheet; the court, nevertheless held this to be a sufficient will, and so the jury found it.

These loose constructions of the statute of wills called for the formal restraints imposed by the 5th and 6th sections of the statute of frauds.

These loose constructions of the statute of wills, which afforded such facilities to designing persons of practising upon the weakness of men on the bed of sickness, or of forging testaments and supporting them by perjury, when the lips of the party were closed for ever, induced the legislature to interpose some additional guards for the protection of these last and most interesting dispositions of property. By the statute of 29 Car. 2. c. 3. it was, therefore, enacted, that "all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute or by force

of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

It is considered by Swinburn among the advantages of a *written* testament, that the testator has thereby an opportunity of concealing the contents from the witnesses, which he cannot do when he makes a *nuncupative* testament. For, says he, (after enumerating many of the motives which may rationally influence the testator to keep those in expectancy ignorant of his last dispositions,) in these and the like cases, after the testator has written his will with his own hand, or procured some other to write the same, he may close up the writing without making the witnesses privy to the contents thereof; and showing the same to the witnesses, he may say unto them *this is my last will and testament, or herein is contained my last will*, and this is sufficient.

It was an advantage of the written will that the contents might be concealed from the witnesses.

Nor, continues he, is the instrument the less available, because the witnesses do not know what is contained in the same, in case the witnesses be able to prove the identity of the writing; that is to say, that the will produced, is the very same writing which the testator in his life-

time affirmed before them, to be his will: otherwise, the will can have no effect through defect of sufficient proof. The same writer, therefore, recommends, lest the will should fail for want of sufficient proof, when the testator would not have the contents known, that the witnesses should write their names on the back, or on some part of the testament, or use some other means that might enable them to depose and testify undoubtingly, that the same is the very writing itself, which the testator affirmed to be his will^b.

This advantage exists equally under the statute of Charles.

What Swinburn here recommends in practice, became soon afterwards the law of the land, by the wise enactments of the statute of 29 Car. II. which, while it gave to the declaration of a man's last will the solemn notoriety of a triple attestation, preserved to testators all the advantages of the written form; for though by the statute of Charles, the three witnesses must sign in the presence of the testator, it is no more necessary for them than for the witnesses who were voluntarily called in by a testator, the instrument in writing, under the statute of Henry the Eighth, to be privy to the contents of the instrument.

In *Peate v. Ougley*¹, which was after the statute of Charles, a testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he

^b Swinb. on Test. part 1. sect. 11. God. O. L. 66.

¹ Com. 197.

tell them it was his will, or express what it was: but it was all written with the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for that it was not enough that the witnesses wrote their names, they ought to attest the signing by the testator, or at least the publication of the will; but that the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other side it was insisted, that the execution was sufficient within the statute; for that there was no necessity for the witnesses to see the testator write his name; and, if he wrote these words, *signed, sealed, and published* as his will, and desired the witnesses to subscribe their names to that, it was a sufficient publication of his will, though the witnesses did not hear him *declare it to be his will*. And Trevor J. inclined, that there was sufficient evidence of the execution.

But the case of *Trimmer v. Jackson*^k went further, for there the witnesses were so far removed from a knowledge of the *contents*, that they were actually deceived as to the *nature* and *purpose* of the instrument, which they were led to believe, from the words used by the testator at the time of the execution, was a deed and not a will. It was delivered as his act and deed; and the words 'sealed and delivered' were put above the place where the witnesses were to subscribe their names; and in consideration,

^k Cited by Denison J. in *Wallis v. Wallis*, 4 Burn. Eccl. L: 127.

as it is said, of the inconvenience that was possible to arise in families from its being known that a person had made his will, it was adjudged by the court, that this was a sufficient execution.

According to these cases it not only appears to have been the opinion of the courts, that it was unnecessary that the witnesses should be privy to the contents of the will since the statute of Charles, (as it certainly appears to have been held upon the statute of Henry the Eighth,) but they seem to have carried the allowance beyond the cases, (loose as they appear to have been,) which were determined upon the statute of wills; for, as we learn from Swinburn, the authorities go no further than to shew, that one of the advantages of the written testament over the nuncupative method, (which was still permitted, where, by the customs of particular places, lands were devisable) was the opportunity it gave to the testator to make an effectual will, without disclosing the contents even to the witnesses, which was a concealment oftentimes of importance to the peace of families; but then the identity of the will ought to be proved: and therefore, it seems to have been a common idea with the writers upon the subject of wills previous to the statute 29 Car. 2., that the nature of the instrument or writing ought to be announced or published by the testator to the parties present.

A reliance upon the security derived from the at-

testation by three credible witnesses in the presence of the testator, may account for the little importance attributed by some of the judges to the publication of the will by the testator; so little indeed, as to deem it unnecessary for him to announce or declare to the witnesses the nature of the instrument they were to sign.

In the case of *Wallis v. Wallis*¹, wherein both *Trimmer v. Jackson*, and *Peate v. Ougley* were cited, there seems to have been some doubt on the subject of publication. The case, however, though argued only at the assizes, shews the opinion of Mr. Justice Denison, as to the necessity for the witnesses to know what instrument they were signing, to be in correspondence with that of Lord Mansfield, and the judges who decided the case of *Trimmer v. Jackson**.

PART II.

Testamentary Capacity.

THERE has been some diversity of opinion as to the age at which the testamentary capacity, as to Of the age at which it takes place.

¹ 4 Burn. Eccl. L. 127.

* But observe what was said by Lord Hardwicke as to the necessity for publication. 3 Atk. 161, *Ross v. Ewer*.

A will may be written on any material, or in any language, so as, if it concern property in England, it be framed with the solemnities required by the English law. Swinb. p. 4. S. 28. 1 Vern. 85.

personal estate, takes place; but the doctrine that it commences in males at 14, and in females at 12, seems to be most relied on^m. But of lands no person can make a will till 21, by the words of the statute of wills, unless by the special custom of particular placesⁿ. And it seems that no custom can enable a male infant to make *any* will before he is 14 years of age^o.

Capacity of
married women.

Regularly, a woman under coverture cannot make a will, either of lands or goods, not even of her paraphernalia, without the consent of her husband^p. Though these become absolutely her's upon her husband's death, and in the mean time they are not subject to his disposition by will. But with the licence and consent of the husband a wife may make a testament of her own, and it is said, even of the husband's goods, Swinb. 89. but he may revoke the same, not only during her life, but, according to Swinburn, after her death, before the will is proved. If, however, he confirm it after her death, he can never afterwards depart from it. But that such an instrument is entitled to be called, in strictness, a will, has been doubted and denied^q. And, without such consent of the husband, the wife has no legal power of making any testamentary disposition of her *own* property, not even of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband. But she may make her husband her executor, and if she do not, and die in his life-time,

^m Harg. Co. Litt. 896. b.

ⁿ Godolph. Orph. Leg. 21.

^o Law of Ex. 153.

^p 3 Atk. 393.

^q 2 Atk. 49.

he is entitled to possess himself of her choses in action, as her administrator.

In equity, however, effect is frequently given to the testamentary dispositions of a wife, as where the husband stipulates that certain personal property shall be enjoyed by the wife separately, it shall be enjoyed by her with all its incidents, whereof the *jus disponendi* is one*. And where she has this power over the principal, she must necessarily also have it over its produce and accretions*.

Where she makes a will in execution of a power, though this is not in strictness a will, yet it is an act of a testamentary nature, and must be proved in the Spiritual Court, or the legatee cannot entitle himself in a court of law; and the course is not to give probate of the will, but administration with the will annexed, as a testamentary paper*. Before the case of *Wright v. Cadogan**, it was well established that a *feme covert* might have power to dispose of land by writing, in the nature of a will, so as to bind the heir, by reserving to herself such right by way of trust, or a power over an use; but, by that case, the doctrine was carried further; for there, articles having been entered into before marriage whereby it was stipulated by the husband that all the estate of his future wife, which she then had,

* 3 Bro. C. C. 8. *Fettiplace v. Gorges*.

* 2 Vern. *Gore v. Knight*, 2 Vern. 535. Prec. in Ch. 255.

* Dougl. 707, *Stone v. Forsyth*.

* 6 Bro. P. C. 156.

or which at any time should descend or devolve upon her, should be conveyed to her own use, and subject to her appointment, it was adjudged that an appointment executed by her in favour of her husband, and her children by him, was a good appointment against the heir, although no conveyance was ever executed, nor any fine levied of the reversion².

Mental incapacity, fraud, duress.

No person who is not of a reasonable mind and sane memory can make any disposition by will; therefore an idiot, or person deprived of his faculties by extreme age, or by intoxication, while the paroxysm endures, is not of testable capacity in the law. For the same obvious reason a lunatic is incapable of disposing of his property by will, except in his lucid intervals, if they occur, and they must be calm and clear intermissions, attended with quietness and freedom of mind. And if a will by a lunatic be rationally drawn up, and the nature of the disorder be such as to afford any reasonable ground to suppose that a lucid interval may have prevailed, the very act itself furnishes an evidence not easily resisted of that sound and disposing mind which is necessary to its validity. As in the case of *Cartwright v. Cartwright*, Michaelmas, 1795, before the delegates. The proposition of Lord Thurlow in the *Attorney General v. Parnter*³, that where lunacy was once established by clear evidence, the party ought to be restored to as perfect a state of mind as he was in before his disorder, to make a good will.

² See the notice taken of this case in *Doe v. Staple*, 2 T. R. 684.

³ 3 Bro. C. C. 441.

was denied by the present Lord Chancellor, who observed, that we might suppose the strongest mind reduced by the delirium of a fever, or any other cause, to a very inferior degree of general capacity; and yet he might be competent to the making of his will, especially of personal estate^z. And the rule is clear that there must always be the *animus testandi*, or the instrument purporting to be a will is of no effect in the law. The parties must therefore be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man. But if, when the fear is past, or the restraint removed, the testator confirms the will, it is made good^a. So likewise, wills procured to be made by artful misrepresentations and fraudulent contrivance, are void. And the question as to the existence of fraud, in cases of real property, is properly examinable in courts of law, on an issue of *devisavit vel non*; but fraud as to a personal will, belongs to the jurisdiction of the spiritual court.

Infancy, non sane memory, ideocy, coverture, or duress exist at the inception of a will, it is absolutely void, though the disability should happen to be removed before the consummation by death, for there must be a good inception, and the party must be qualified when the will is made^b. But if there is no disability when the will is made, a subsequent loss of intellect will not revoke

^z 11 Vez. Jun. 11.

^a Swinb. 475.

^b Plow, 343. Raym. 84. 1 Eq. Ca. Abr. 171. 2.

it. But the will of a woman is revoked by her subsequent coverture, as will be seen in a future part of this work.

How affected by conviction, attainder, outlawry, and self-murder.

A person attainted of treason forfeits lands and goods, and is of course incapable of disposing of them by his will. So a felon, upon attainder, forfeits the fruits of his lands for the year and the day; after which they escheat to the Lord of the fee. But the forfeiture of goods and chattels is absolute, as well in felony as treason; differing from the forfeiture of lands in respect of its commencement, the latter taking place upon the attainder, and not before; the former upon the conviction. It follows, therefore, that if the party dies, before attainder in the one case and conviction in the other, the forfeiture is saved; his will either of lands or goods is effectual. But if conviction or attainder takes place, the will of the traitor or felon, as to his goods, by the conviction, and as to his real estate, by the attainder, is rendered void; and that, although such will was made before either the conviction or attainder. The King's pardon restores the disposing capacity, and the party may afterwards make his will, as if no conviction had taken place: and it seems, that by such pardon, any will made before conviction, recovers its former force and effect^c. Though it may be doubted whether a will or testament made after conviction, would be rendered operative, as not having had a legal and valid inception. The will

^c Swinb. 97.

of a *felo de se* may, it seems, be effectual, as to his lands, because these are not forfeited but by attainder, which cannot be in this case. But as to his goods and chattels his will is of no effect (1).

A person outlawed in a personal action, forfeits his goods, and is therefore incapable of disposing thereof by his will, but it seems he may devise his lands^d. But it is to be recollected that the wills of traitors, felons, aliens, and outlawed persons, are void only as to the King or Lord of the Fee, who has the right to the lands or goods, by reason of the forfeiture: the will is good as against the *testator himself* and all *other* persons.

As the person devising or bequeathing must be a person capable of making a will, so the devisee or legatee must also be capable of taking under it; and if he dies before the testator the gift vanishes. Neither the heir or executor are capable of taking originally; if the original object of the gift be dead, there is no person to whom the designation can apply^e.

^d Swinb. 107.

^e Plowd. 345. *Brett v. Rigden*.

(1) Plowd. Comm. Eng. Ed. *Hales v. Petit*, 261. and observe the subtle grounds on which this point was reasoned by C. J. Dyer.

PART III.

Estates by Custom.

Neither the statute of wills nor the statute of frauds extends to copyholds.

Reasons for holding *copyholds* to be out of the statute of 29 Car. 2. c. 3.

IT may be received as settled doctrine, that wills of copyholds stand clear of the statute of frauds as well as of the statute of wills. It has before been observed, that the statutes of Henry VIII. required the tenure to be in soccage, which is not the description of copyhold tenure, and therefore, for that reason the statutes of wills would not apply to this description of estate. We observe also, that copyholds could not be considered as having been embraced within the intention of those statutes, which was to revive the testamentary power with certain qualifications and restrictions, after the statute made for carrying the possession and legal estate to the use had either suppressed its exercise, or driven it upon new expedients for its preservation. The statute of uses had not interfered with the uses raised upon surrenders*, those being properly executed by the admittance, which operated as a new grant thereof by the lord pursuant to the surrender. Neither, indeed, could it be properly said, that copyholds were ever devisable, for a will can have no effect upon them as a will, so that it was always necessary

* 2 Vez. 257.

first to pass the estate by a surrender thereof, into the hands of the lord, to such uses as the surrenderer should, by his last will, appoint, and then his will succeeded to this act as an appointment or declaration of the use ^b.

By thus regarding the surrender as the mean whereby the lands themselves are transferred, and the will as having no specific operation under the statute of wills, but as a mere declaration of an use, or rather an appointment of the person to be admitted upon the surrender, we see the reason (not always indeed approved of) for holding wills of copyhold lands to be out of the statute of frauds, there being no *special* provision applicable to copyhold estates contained therein. Accordingly in *Carey v. Askew*^c, it was held by Sir Lloyd Kenyon, Master of the Rolls, that any testamentary paper would be sufficient to pass copyhold lands; and his Honour said, he hardly expected to hear it seriously argued; it had been held, that a will received by the ecclesiastical court will govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject."

Lord Macclesfield^d admitted the same doctrine as perfectly settled in his time, though certainly not

Lords Macclesfield and Hardwicke not satisfied with the reasons.

^b See the case of *Royden v. Maltster*, 2 Roll. Rep. 383.

^c 2 Brown, C. R. 58.

^d 2 P. Wms. 258.

is tenant to the lord, and liable to answer all the services."

But in *Tuffnell v. Page*, before Lord Hardwicke in 1740, a different opinion, and which seems to be the doctrine as now understood, was maintained by that chancellor on this subject. His Lordship said, he would consider the case in two lights—first, whether the will of a copyholder, unattested by witnesses, was sufficient to declare the uses of a surrender, made to the use of a will; and secondly, where there is no surrender, as in the case before him, whether such a will was sufficient to pass the trust of the copyhold lands to the plaintiff.

With respect to the consideration of the question in the first of these lights, his Lordship said, that where a man was seised of copyhold lands and surrendered to the use of his will, and executed a will, though not attested by witnesses, yet it should direct the uses of the surrender; for the clause in the statute of frauds and perjuries, which required the testator's signing in the presence of three witnesses, and their attestation in his presence, was confined only to such estates as passed by the statute of wills 34 H. 8. c. 5. which was an act to explain one made in the 32d of the same King; and which at the close of the section enacted, that the words, estate of inheritance, in the former statute, should be declared, expounded, taken, and judged of estates of fee simple only, which shewed plainly, that it did

not extend to customary estates, and had been so settled ever since the case of the Attorney General v. Barnes. This was reported in 2 Vernon, where it was said in page 398, "as to such of the lands as were copyhold, it was agreed they were well appointed, they passing by surrender and not by will, though there were no witnesses to it."

As to the second question, whether the will in question would pass the *trust* of the copyhold lands, his Lordship said, that where the legal estate was in trustees, the *cestuy que trust* consequently could not surrender, but the lands should, notwithstanding, pass by this devise according to the general rule that equity follows the law; for a copyhold would pass under a will without three witnesses, or where there were no witnesses at all; and if this nicety was not required in passing the legal estate, *a fortiori* it was not in passing the *equitable*: and, therefore, the *cestuy que trust* might, by the same kind of instrument, dispose of the trust estate, as if he had the legal estate in him."

It may, therefore, be regarded as settled, that no attestation is requisite to an instrument in the nature of a will designed to carry into effect a previous simple * surrender of copyhold land to the uses thereof, but that any paper having a testamentary

* That is, where the surrender is silent as to the form.

Whether an appointment or declaration of the uses of a copyhold surrendered may be without writing?

operation, and received in the ecclesiastical courts as such, is sufficient. It has even been doubted, whether such testamentary appointment may not be by parol, for if copyholds are not affected either by the statute of wills, or by the clause respecting wills in the statute of frauds, a testamentary disposition of them, as such, seems to be no more necessary to be in writing, than the devises by the custom of particular places which operated independently of the statute of wills, and might *after* that statute, and until the statute of frauds expressly restrained them, have been made by word of mouth; and if such wills of copyholds be regarded as mere appointments, they are still clear of the first and third clauses of the statute—by the exclusive wording of the first, and by the express exception in the last. And by a late case, *Doe d. Cook v. Danvers*^f, it has been determined that they cannot be regarded as declarations of uses or trusts, so as to be within the 7th section of the same statute.

An attested will of copyhold may be revoked by an unattested will.

As the attestation of three witnesses is not *necessary*, so neither has it any *efficacy* in respect to copyholds; so that if a surrender be made to such uses as the surrenderer shall appoint by his will, and he afterwards make his will, executed and attested according to the statute of frauds, such will is nevertheless subject to be revoked or republished by him by any subsequent testamentary paper, attested

^f 7 East 299.

by one or two witnesses only, or without any attestation at all¹. But if a surrender be made to the use of a will, to be executed with those or any other solemnities, it is clear that such prescribed requisites must be strictly complied with as in other similar cases².

It should be observed, before this part of the subject is dismissed, that although a will of copyholds is said to work as a declaration or appointment of the use only, and this is the ground upon which it is held to stand clear of the clauses regarding wills in the statute of frauds, it partakes of the quality of a will in many essential particulars; thus it is revocable by alteration or cancelling, and is altogether an ambulatory instrument until the death of the party; so that if the appointee die in the life-time of the testator, I apprehend it to be quite clear that the devise fails; for the act remains incomplete, and the instrument is without operation and mute until the testator's decease. And it is to be remembered, that in respect to freeholds, a will to pass lands in virtue of a power, must have the ceremonies by the statute of Charles made necessary to wills of lands.

How far such will, though it operates as an appointment or declaration, partakes of the qualities of a will.

But although it seems now to be regarded as settled, that the trust or equity of a copyhold estate will pass by a will not executed or attested accord-

A will disposing of the equitable estate in customary freeholds must be executed and attested according to the statute of frauds.

¹ Vid. *Burkitt v. Burkitt*,
2 Vern. 498.

² Vid. *Cotton v. Layer*, 2 P.
Wms. 623.

ing to the statute of frauds, upon the principle of *equitas sequitur legem*, and on the ground that a strictness which had been dispensed with in respect to the *legal* estate in copyholds, ought *a fortiori* to be dispensed with in respect to the *trust* estate in copyholds, yet a different doctrine seems to have obtained concerning the equitable interest of a *customary freehold*, where there exists no custom of the manor for surrendering them to the use of a will. This was so held in the case of *Hussey v. Grills*^b, where Elizabeth Prowse, being seised of a customary estate within the manor of Stoke Climsland in Cornwall, surrendered it to Thomas Jones and his heirs, who afterwards declared the trust to be for Elizabeth Prowse, her heirs, and assigns, and covenanted to surrender to such uses, as she should by deed, executed in the presence of two witnesses, or by her last will appoint. E. Prowse afterwards made her will on the 24th January 1753, in writing, but not attested according to the statute of frauds; (but which seems to be mistakenly reported (3), as the decision and reasoning of the case plainly supposes and requires the will to have been effectual, and consequently executed according to the statute,) and devised the customary estate to Margaret Archer, her heirs and assigns for ever. She afterwards made a codicil in her own hand-writing, but unattested, and there-

^b Ambl. 299.

(3) The cases in Ambler seem to be a very careless compilation.

by revoked the devise in her will of the customary estate, and gave it to Margaret Archer for her life only, with remainders over; and the doubt was, whether the codicil was a good revocation of the will, and passed the customary estate.

The Lord Chancellor Hardwicke said, that the question was, whether these customary estates were, in point of conveyance or devise by will, so far like copyholds, that the determinations with respect to the latter shall govern these in like manner and parity of reason. That courts ought to avoid making large and liberal constructions to take cases out of the statute of frauds; which was made to ascertain property, and the words whereof were very extensive. That copyholds were not devisable by will, nothing passing out of the surrenderer till the will was made; and when it was made, the lands did not pass by the will; the devisee might come and be admitted on the foot of the surrender and will taken together; just as if the name had been inserted in the surrender itself. That the ground of his opinion in *Tuffnell v. Page*, was *equitas sequitur legem*. That customary freeholds and copyholds differed extremely in their nature: the latter being of a base tenure, and by the old common law, held at the will of the lord, though now established on a more firm footing; customary freeholds never were of the base kind. That Jones was a trustee, and the legal estate was in him. There was no evidence that there could be in that manor a surrender of a

customary freehold. It was agreed that there never was such. That the foundation of the determination as to copyholds was, that the party might dispose by surrender and will. As there was no method of passing the legal estate of these customary freeholds in that way, there was no reason to hold them out of the statute. And if the legal estate was not so, so was not the trust. There was something, observed his Lordship, arising out of the declaration of trust, which induced him not to make a large and liberal construction; for as two witnesses were required by it to the execution of a deed, it seemed strange to think, that in case of execution by will, it might be on a loose paper, without any witnesses at all. It has been held, however, in the late case of *Cook v. Danvers*^{*} that such customary freeholds where there is a custom for surrendering them to the use of a will are as much out of the statute of frauds as common copyholds; and it should seem that the trust also of such estates would by analogy to the principle of the case of *Tuffnell v. Page*, be considered as out of the statute.

But where there is a custom for surrendering these equitable estates to the uses of a will they seem to be out of the statute.

All equitable estates of freehold must be devised by a will executed and attested according to the statute.

It seems scarcely necessary, after the opinions and determinations which have been produced, to observe to the reader, that in a devise of a *trust* or *equitable estate* in freehold lands, the formalities of execution and attestation, required by the statute, are as necessary to be observed as in wills disposing of the *legal*

^{*} 7 East. 299. Sup. 40.

estate. There can be no question, said Lord Maclesfield¹, but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate ; for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were occasioned before the statute, by a devise of the legal estate in fee simple.

Though the necessity of writing imposed by the statute of Charles was already a condition of their validity by the statute of wills, yet this requisition of the second act was not nugatory, since lands that were devisable by local custom, (for enforcing the testamentary dispositions whereof the register has furnished an appropriate writ^m,) were left untouched by the statutes of Henry (4).

Wills of lands devisable by custom, must be in writing by the express direction of the statute.

¹ 2 P. Wms. 258.

^m *Ex gravi querela.*

(4) But it may still in some certain cases be necessary to resort to the custom of a place ; as where it enables an infant *of fourteen*, or, perhaps, a *feme covert*, neither of whom is capable, under the statutes, of devising lands. Vid. 2 And. 12. where it is said that a custom enabling an infant *under 14*, (at which age, and not before, the law supposes some discretion,) would not be good.

PART IV.

Estates pur auter Vie.

THE 12th section of the statute of frauds enacts as follows :—“ And for the amendment of the law in the particulars following, be it enacted, that from henceforth any estate pur auter Vie shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses ; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple, and in case there be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.”

As by this provision of the statute of frauds these freeholds, held for the lives of others, are made devisable as fee simple estates, the statute of fraudulent devises^a, which vacates devises of land as

^a 3 and 4 W. and M. c. 14.

against specialty creditors, has been clearly held to attach upon this newly (1) devisable property, in the same manner as upon fee simple estates. But as the quality of these estates may be much affected by the terms in which they are granted, being sometimes limited to go to the heirs, and sometimes to the executors, administrators and assigns, which may vary the result as to the operation of testamentary dispositions, it may be useful to take rather a large view of their nature, and the consequences of the several enactments regarding them.

By the common law, where a man was tenant for the life of another, by virtue of a grant to himself only, without mentioning his heirs, and died during the life of him for whose life the estate was holden, in such a case the first occupant, or he who could first get possession of the land, was authorised to keep such possession as long as the cestui que vie lived ; and this was called general or common occupancy. But this title of general occupancy has given place to the regulations of the statute 29 Car. 2. c. 3. the subsequent statute 14 Geo. 2. c. 20. But by the 9th section of the statute last-mentioned, which recites that by the former statute it had

(1) These estates pur auter vie, could not be devised within the statutes 32 H. 8. c. 1. and 34 and 35 H. 8. c. 5. which last statute explains estates of inheritance to mean estates of fee simple only.—Per Curiam, in *Took v. Glascock*, 1 Saund. 261. These estates by occupancy were neither devisable nor subject to debts before the statute of frauds. *Ragget v. Clerke*, 1 Vern. 234.

been enacted, that estates pur auter vie, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands, and that doubts had arisen, where no devise had been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners were fully satisfied, should belong, it is provided, "that such estates, pur auter vie, in case there should be no *special occupant* thereof, of which no devise should have been made, according to the said act for prevention of frauds and perjuries, or so much thereof as should not have been so devised should go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

Wherever the limitation in these grants pur auter vie is to the grantee and his heirs, the heir at common law is the person to take upon the death of the tenant in the life-time of the cestui que vie, and in such a case there never was any room for general occupancy, if there was any heir to take. But in what *character* or *capacity* he takes has been a question on which very great lawyers have held different opinions. Lord C. J. Vaughan in the great case of *Holden v. Smallbrook*^b, held, that if a man demised land to another, and his heirs habendum pur auter vie, or granted a rent in the same

^b Vaughan, 187.

manner, though the heir should have the land or rent after the grantee's death, yet he had it not as a *special occupant* (as the common expression was) for if so, such heir would be an *occupant*, which he could not be, but he had it as *heir*, not of a *fee*, but of a *descendible freehold*, and not by way of limitation as a purchase to the heir, but by descent, though some opinions are, that the heir took it by special limitation. But the Chief Justice added, that he did not see how, when land or rent was granted to a man and his heirs, *pur auter vie*, the heir could take by special limitation after the grantee's death, *when the whole estate was so in the first grantee that he might transfer it to whom he pleased*, so as to deprive him who was intended to take by *special limitation* after the grantee's death.

Lord Vaughan's opinion that this estate comes to the heir by a proper descent.

This reasoning is certainly very powerful, but other Judges, though they have adopted the phrase of Lord Vaughan, of *descendible freehold*, have adhered to the notion of occupancy in the heir, and have denied the inheritable nature of this kind of estate. Thus in *Low v. Burron*^c, Lord Chancellor Talbot held clearly that an estate to one and his heirs *pur auter vie* may be limited to A. in tail, remainder to B., for in such cases of limitations to the heirs of the first taker, the word *heirs* was only a description of who should take as *special occupants* during the life

^c 3 P. Wms. 362.

of cestui que vie; for in truth these were no estates tail, for all estates tail were estates of inheritance to which dower was incident, and which must be within the statute de donis; whereas in this kind of estate, which was no inheritance, there could be no dower, neither was it within the statute (2). If it were an estate tail, added his Lordship, it would not be liable to forfeiture, or punishable for waste, the contrary whereof was true of the estate in question. And again, by the same Chancellor it was held, in *Chaplin v. Chaplin*^d, that where a lease is made to a man and his heirs, during lives, the heir does not take by descent, but as a special occupant; and though it be called a descendible freehold, it is not really a descent, being no more than if there had been a designation of any person by name to enjoy the estate for three lives, after the death of the father, instead of the heir at law. And it was therefore holden, that in such a case the parol should not demur, which is always allowed in the case of a proper descent to an infant (3). And it is also to be ob-

^d 3 P. Wms. 368.

(2) It is plain there can be no occupant of an estate tail, because none can have the estate tail but the issues of the donee, who *must* take by *descent*.

(3) It is true the course of succession must certainly follow the inheritable quality of the land. Thus it has been held that where a lease was made to a man and his heirs, during three lives, of lands in Borough English, the youngest son shall inherit this descendible freehold. But there the special occupancy is only regulated as in the other cases, by the descriptive force of the word *heir*, taken secundum

served, that such a succession to this estate is no descent to toll an entry*. So that if a disseisor make a lease to man and his heirs, during the life of I. S. and the lessee die, living I. S. the entry of the disseisee is not thereby taken away, because he that died seised had but a freehold, and the heirs are added to prevent the occupant†. So that upon this reasoning it should seem that this estate is not so properly a descendible freehold, as a freehold limited to go in a course of descent; which limitation prescribes only who shall be the occupant, without changing the nature of the estate into an inheritance. Yet Lord Vaughan observes, that the heir of the grantee pur auter vie might certainly recover by a writ of mortdancer, in case of abatement, which, he says, infallibly proves the heir to take by descent, as succeeding to one who died seised *as of a fee*, though not seised *in fee*; for which he cites Bracton (4). But in Walsingham's case, in Plowden, the learned Apprentice stated arguendo that the heir in such a case should not have an assize of mort-

* Litt. Sect. 387.

† Co. Litt. 239. a.

subjectam materiam. 2 Freem. 395, 399. Co. Litt. 110. b. But the customary descent may be confined by special custom to fee simple.—See Append. to Rob. Gav.

(4) Si autem fiat donatio sic, ad vitam donatoris, donatorio et heredibus suis; si donatoris premoriatur heredes ei succedent, tenendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt, qui obiit ut de feodo. Bract. l. 2, de acquirendo rerum dominico. c. 9.

dancester, and he was not contradicted. Yet what shall be said of annuities and rents, of which there can be no special occupant, and yet if a man grant an annuity to another to hold to him and his heirs for the term of another's life, and the grantee die during the life of the cestui que vie, his heir shall have it, according to Littleton^s, who nevertheless concludes with a *quære de ista materia*. Upon which Lord Coke observes, that in the case of land the heir shall have it, to prevent an occupant; and so it is in the case of an annuity, or of any other thing that lies in grant, whereof there can be no occupant,

It is worthy of observation, that in Swinner-ton's case, in Dyer^b, where a rent was granted by fine to F. to hold to him and his assigns during the life of Cassandra, the grantor's wife, and if it should be behind, *quod bene licuit dicto F. et hæredibus suis, durante vitæ dictæ Cassandræ distringere*, and F. devised the rent and died, living Cassandra, Dyer was of opinion that the devisee should have it, for by the clause of distress F. had the fee simple determinable upon the death of Cassandra; which seems an extraordinary opinion, and certainly opposed by the resolution, in Chudleigh's case^c, and numerous other authorities, wherein it has been uniformly held, and never doubted, that an estate to one and *his heirs*, during the life of I. S. is but an estate for life, upon which a remainder may depend. And the

^s Sect. 739.^b Dyer, 252.^c 1 Rep. fo. 4. b.

three classes into which a fee is distributed by the very learned reporter, in his own argument, in Walsingham's case, clearly excludes this estate from any description of a fee; either the fee simple, the fee simple determinable, or the base fee.(5). The question therefore seems to remain in some uncertainty as to the true nature of the estate where the grant is expressly to a man and his heirs pur auter vie, though the preponderance seems to be on the side of the doctrine which treats it as a freehold to which the heir succeeds as occupant by special designation, and not by regular title of descent.

There has been some controversy on the question, whether a lease before the statute of frauds to a man and his executors during the life of another, would go to the executor as a special occupant. Mr. Hargrave has put this matter doubtfully in his notes to Coke Littleton^{*} where he says, after citing some authorities the other way, "however some have thought that executors and administrators, if named in the grant, might take an estate pur auter vie, though a freehold, even before the statutes 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. by which they are now

Whether an executor might be a special occupant.

^{*} Hargr. Co. Litt. 41. b.

(5) Plowd. Com. 557. And see Cro. El. 805, where Popham said, that rent granted to one and his heirs for the life of I. S. shall not be devisable by the statutes 32 and 34 H. 8. for it is no fee, and he added, that the greater part of the Judges were of his opinion. But Gawdy and Fenner contra.

entitled." In *Westfaling v. Westfaling*¹, Lord Hardwicke declared his opinion, that executors might take as special occupants; and he further added, that he thought it would be assets in their hands. The same opinion is intimated by him in *Williams v. Jekyl*^m. And his reason for holding such estate, so limited, to be assets, was, that he thought the executor by force of his office could take nothing without its being so.

In the *Duke of Devon v. Kinton* (6), where A. having an estate to him and his *heirs* for three lives, settled it on his daughter and her husband for their lives, remainder to the use of his own *executors* and *administrators*, and after the death of his daughter and her husband, having devised the estate to his wife, died indebted by simple contract, and the question being whether the residue of the term should be assets to pay a simple contract creditor, it was so decreed; for being limited to the *executors* and *administrators* of A. it became personal estate, and he could not devise it exempt from his debts, though due by simple contract. There appears, indeed, to have been a stronger reason for saying that an *administrator* could not take as a special occupant, for it seems that the law will not suffer a free-

¹ 3 Atk. 466.

^m 2 Vez. 681.

(6) 2 Vern. 719. but in 2 P. Williams, 360, it appears that the lease was originally granted to trustees.

hold to be in suspense, and that a person to entitle himself as special occupant must enter immediately on the death of the tenant pur auter vie, which an administrator cannot do, though an executor may ^a.

It seems as if the framers of the statute 29 Car. 2. meant to apply the term *special occupant* only to the *heir*, and perhaps with a cautious nicety in the use of the phrase. But the words, '*that in case there shall be no special occupant it shall go the executors and be assets,*' seem virtually to include the case where the grant is express to the executors of the grantee, for if the executor *can not* take as special occupant, it is as if he had not been named, and then the statute gives it to him for want of a special occupant. If he *can* take as special occupant, it seems absurd to say that the statute could mean that in that character he should take for his own benefit, or in other words, that if named in the grant he should take for his own benefit, and if not named, that then the estate should be assets in his hands. If he should be held to take as special occupant, by reading the words '*special occupant*' in the statute, as if they had been *such* special occupant, and as applying to the heir only, whose case had just been mentioned, the case of the limitation to executors is brought fairly within the statute; and then the construction would be, that

Whether he can take the surplus for his own benefit; and how far the statutes have changed the nature of the estate.

^a Moor, 664. 907.

if the grant was not to the heirs, the estate should, whether executors and administrators were named or not, go to the executors or administrators as assets. But we have seen that even if such estate limited to executors and administrators were held to be out of the statute altogether, still there is both reason and authority for saying that by force of their office simply, the property coming to them must be assets in their hands.

The statute of 29 Car. 2. c. 3. makes these estates coming to the heir for want of being devised (and by the same statute they can only be devised by will attested by three witnesses) assets for specialty creditors; and in the hands of the executors or administrators, where no special occupant, assets for both specialty and simple contract creditors. The statute of 14 Geo. 2. c. 20. s. 9. looking to the case where there is no devise or occupancy, and thus partially provided for by the statute 29 Car. 2. makes the surplus after payment of debts applicable and distributable as personal estate. And when the force of the words "shall be applied and distributed" are properly attended to, it is difficult not to infer that the legislature intended that the executor should not retain this surplus beyond the amount of the debts, as special occupant, but that it should pass by the residuary bequest of the personalty if not particularly devised.

Supposing, then, under these circumstances a party to make a will, devising the residue of his

personalty, but unattested according to the statute of frauds, and therefore not operating immediately upon the dry legal subject being still in its nature freehold, though at least to a certain extent under the above-mentioned statutes beneficially applicable as personalty, what is to become, in a court of equity, of the interest after debts paid? Is it to go to the legatee, to the heir, to the next of kin, or to be retained by the executor?

Such a case presents itself under two aspects: first, suppose that before the statute the executor was, by virtue of such express limitation to executors, a special occupant, and that, the statute having enacted if case there was *no* special occupant, the estate should be assets in the hands of the executor or administrator, the case might be regarded as being out of the statute where the executor was named as special occupant; in this view of it, it might become necessary to enquire what would have become of the estate in the hands of the executor, as such special occupant.

We have the decided opinion of Lord Cowper* upon this subject, who made no difficulty of holding it to be personal estate, though originally granted to a man and his heirs, if it was afterwards by him granted to executors, though it must be remember-

* 2 Vern. 719. 2 P. Wms. 380.

ed that when the same case was before Lord King it appeared to be in trust. In *Westfaling v. Westfaling*, above cited, it appears to have been also the opinion of Lord Hardwicke, that an estate *pur auter vie* to a man, his executors, administrators, and assigns, was assets to pay debts *before* the statute. And in *Oldham v. Pickering*^p, which was a case before the statute Geo. 2. (as that case is reported in Carthew) Lord Holt seemed to entertain a degree of doubt whether such an estate was not assets to pay legacies. It appears indeed to have been the opinion of the annotator upon the case of the Duke of Devon *v. Atkins*, in *Peere Williams*, first edition, that there was an equity to say, that, if the executor or administrator took it as special occupant, the effect of his character as executor or administrator, would fix upon his legal title an equity for those who claim the personal estate, to make him a *trustee*.

It seems, therefore, that the fate of property so circumstanced was not very well settled, independently of the statutes of Charles 2. and George 2. We perceive too, by the recital in the clause relating to this subject, in the statute of Geo. 2. c. 14. that doubts had existed after the provision by the 12th Section of the statute 29 Car. 2. c. 3. as to the persons to take after payment of the debts, and that the clause in question of the 14th Geo. 2. was made to

^p 1 Lord Raym. 96. Carth. 376.

exclude such doubts. By this statute of George 2. therefore it was provided that the surplus should be *applied* and distributed as personal estate. Upon which clause the present Chancellor declared himself to have a strong inclination that the meaning was, that the residuum of such estate was to go with the rest of the personalty, where there was a will, and to the next of kin where there was an intestacy; and that the language of the statute would bear this out, for it would be extraordinary that persons claiming by bequest should not have been attended to, when even upon the statute of Charles 2. Lord Holt doubted as to legacies. The true state of the question in *Ripley v. Waterworth*¹ was, whether, if notwithstanding the statutes of Car. 2. and Geo. 2. the interest in such an estate comes to the executor in the nature of a freehold, though by force of those statutes applicable to a certain extent as personalty, he is not in a court of equity so completely a trustee for the persons entitled to the personal estate, as that a will not *attested by three witnesses*, but disposing of the residue of the personalty, will give to the residuary legatee, after the debts paid, a title to call upon the executor for his benefit. Upon this case Lord Eldon observed, that he could not adopt the principle of considering the estate as personal, to the point of giving creditors a claim upon it, and no farther. His Lordship was of opinion, that after the debts were paid, in obedience to the statute,

¹ 7 Vez. Jun. 425.

the character of executor still remained in him, whether considered as special occupant or not: that such character raised a trust in *him*, and an interest in *others*. To the extent of giving an interest to all, who were in a situation to claim the personal estate, it *was* personal estate.

It is to be observed, that in such a case the heir could have no title; for he could only take as special occupant, and if as special occupant, still as occupant, and there could be no occupancy without a previous vacancy, whereas the estate in the case supposed would be full of the executor. If the executor has it, the great question is, how he has it? is it freehold or personal estate? Is that which one statute has made personal to the extent of being assets, and therefore subject to be sold as such upon a *fieri facias**, and by another statute distributable under administration out of the spiritual court, still to be considered as in the nature of freehold in the hands of the executor, against any persons claiming the personal estate? There is besides great difficulty in saying what shall become of such an estate with this changeling sort of character belonging to it, in case of the death of the executor, if he takes it as special occupant in the nature of a freehold. Such a case would be surrounded with difficulties†. But as the statute uses only the expression *pur auter*

* *Atkinson v. Baker*, 4 T. R. 231.

† See *Oldercon v. Pickering*, 1 Lord Raym. 96. Comb, 291.

‡ 7 Vez. Jun. 445. 451.

vie, not distinguishing between the grant to a man's heirs, and to his executors, in imposing the necessity for three witnesses to validate a devise of it, the residue in the case above alluded to would not pass strictly by the will. But Lord Eldon was of opinion, that in a court of equity the estate was to be considered as belonging to those who take personal estate by an equity attaching upon the character of executor *as* executor. And he resembled it to the case of stock which can be disposed of only by a will with two witnesses (7); but that according to Lord Thurlow, where it is not so bequeathed, it devolves upon the executor in trust for those who are entitled to the personal estate, under the residuary bequest; the will operating as a direction to the executor how to apply it, though it was not devised by that will^a.

Upon the whole, therefore, as the question now stands, upon the authority of the much reasoned case of *Ripley v. Waterworth*, in equity at least, an estate granted to a man, his executors, administrators, and assigns, though devisable as to the legal interest only by a will with three witnesses, is personal estate, or in the nature of personal estate,

^a 7 Vez. Jun. 448. 452.

(7) By 33 Geo. 3. c. 28. s. 14. and 35 Geo. 3. c. 14. s. 16. it is provided that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing, attested by two or more credible witnesses.

in the hands of the executor, and the benefit as to the surplus belongs to the legatee under the will as such, though the will is not attested, so as to pass it at law. In a word, it is personal estate as to those claiming as creditors and representatives. But yet the essential character of the estate as a freehold remains, as to other persons who can only take the legal interest in it by a conveyance applicable to freehold property.

PART V.

Powers to be executed by Will.

Powers of appointment to be executed *generally* by will, without any directions as to the *mode* in which such will is to be executed, must be executed, by a will attested according to the statute of frauds.

WHERE a power is given or reserved by deed to be executed generally by a will, without any words expressing or importing the manner in which such will is to be executed; if the subject of such power is real estate, the power will be ill executed by any will not signed by the testator, and not attested by three witnesses by the subscription of their names in his presence, according to all the circumstances required by the statute to give effect to a devise of lands. Lord Macclesfield, in *Longford v. Eyre*^a, much doubted whether the will in that case would have been a good appointment, had it not been executed pursuant to the statute; because, said his

^a 1 P. Wms. 741.

lordship, when a power is given to appoint the uses of land by deed or will, the will must be intended to be such a one as is proper for the disposition of land, and consequently, should be subscribed by three witnesses, in the presence of the testator. For this is within all the inconveniences which the statute of frauds was intended to prevent, and the words *in the nature of a will*, mean the same as a will, which must therefore be subscribed by witnesses in the presence of the testator. And according to the same Chancellor, in *Wagstaff v. Wagstaff*^b, if the trust of lands be limited to such persons as a man shall by will appoint, and the *cestui-que-trust* devises these lands by a will executed only by two witnesses, the will is void, and will not operate as an appointment. In confirmation of which, it was said by Sir John Strange, at the Rolls, in introducing his judgment in *Jones v. Clough*^c, that “where the owner of an estate in land, *either in law or equity*, reserves to himself a power of disposing of it to such uses as he by will shall appoint, that must be by such a will as within the statute of frauds would be proper for a devise of land; otherwise the statute would be entirely evaded.”

And the same doctrine holds in respect to trust estates.

But if the power extends over personal as well as real property, though a will made in execution of the whole power should fail as to the land for want of a sufficient attestation, it may nevertheless be a good ex-

But if such power extends to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass personal estate.

^b 2 P. Wms. 258.

^c 2 Vez. 366.

ecution of the power with respect to the personalty. Thus where a man by his will had given several shares in the Sun-fire Office to his daughter, and after her decease to such persons as she should by her will direct; and had also devised real and personal estate in Jamaica, in moieties, the one moiety to Frances for life, and after her decease, to such person as she should by will direct; the other moiety to another person, in like manner; the daughter, by her will reciting that of her father, disposed of the Sun-fire shares, and also by the same will devised the real estate, but the will was not duly executed to pass real estate, being attested by two witnesses only; and Lord Chancellor Thurlow held that the will being sufficient to pass the personal estate, was so far a good execution of the power^d.

If an agreement be entered into to charge lands with such sums as a stranger shall by his last will direct, such direction will be good if made by an unattested will—but it seems otherwise if such power be given or reserved to the owner, or to one of the owners of the inheritance.

If an agreement be entered into, to charge certain lands with a sum of money for the benefit of certain persons named, in such shares as a *third* person shall direct by his last will, such will need not be executed as the statute requires for passing real estate; but if one or more having the inheritance in them of certain lands, agree that *one of them* shall have power to charge the same with any sum by his last will, this power can only be well executed, as it should seem, by a will with three

^d Duff v. Dalzell, 1 Bro. C. R. 147. et vide Powell v. Beresford, 2 Lord Raym. 1282.

witnesses. This doctrine is furnished by the case of *Jones v. Clough**, determined at the Rolls by Sir John Strange, which case was, in effect, as follows:

On the marriage of Thomas Clough, an estate was settled to the use of himself for life, remainders in the common manner in strict settlement. When John the eldest son of the marriage, and Thomas the younger, came of age, articles were entered into, reciting the settlement, and that "whereas there was thereby no provision or portion for maintenance of younger children, though several were then living, to the intent therefore that 300l. might be raised, Thomas the father, John the son and heir, and Thomas the younger, had taken it into consideration, and agreed, that 300l. should be raised in and upon all or part of the premises, from and immediately after the death of Thomas the elder, and to be paid to such younger children in such manner and form as *he* should by his last will, *duly executed*, direct and appoint; and in order to have the same effectually done and assured, the two sons did covenant, grant, promise, and agree, jointly and severally, for themselves, their heirs, &c. that after their father's death, any part might be granted, mortgaged, or disposed of, for raising the 300l. to be paid as the last will and testament of

* 2 Véz. 365.

Thomas the elder should direct and appoint, and to no other use. The father, by will, attested only by two witnesses, distributed this 300l.

John dying without issue, having suffered a recovery of part, Thomas became tenant in tail of the rest, and now insisted, that the provision, made for himself and the rest of the children, could not take effect, as not being a proper execution of the power, the will not being such as would pass lands, according to the statute of frauds, all the requisites of which were required by these articles, and the addition of *duly* was equal to *legally*.

But the Master of the Rolls adjudged otherwise, observing that it was to be considered, whether the father, by the articles or will, parted with any thing in his power to give. By the settlement, he was bare tenant for life; and by the articles had granted nothing, the charge being to take effect *after his death*. The agreement, indeed, was recited to be between the father and two sons, and referred to the act of the father by will *duly* executed; but in the next clause, which was to charge the estate, the two sons only covenanted and granted to the trustees, that this 300l. should be a charge; and it was upon *their* estate; and the intervention of the father was only to *apportion* the sums. It was not his will that actually made the charge; he was only referred to as a proper person for that purpose.

This cause was attended with such circumstances, that the court was well warranted to go as far as they could to relieve the person standing in the place of the younger children, especially against him who was to have the benefit of the articles, but who by the accident of his brother's dying, without issue, had turned the tables: it being more for his benefit to say, they should not be carried into execution.

The word *duly* was in the agreement, as recited, but not in the covenant of the two sons. But it was not necessary to lay any great stress on that; because supposing it were the case of the *owner* of an estate, reserving to himself a power by will, without adding *duly* or *legally*, his Honour admitted, that in such case his act must have been such, as would have answered the utmost idea of the word *duly*, though the word *will* had been only mentioned.

But certainly there might be cases, where the words *duly executed* might not require the solemnity of the statute of frauds; for if no lands were given by the person making the will, that would be *duly* executed, though there were not those witnesses, which the statute required to pass real estate, because these words must refer to the *nature* of the act, and the *nature* of that which passed by it. Yet if the word *duly* were to be construed otherwise, there *have been* cases where a court of equity under

When a will operating by way of appointment is merely collateral to the estate, and made by a person having no interest to pass, it may be good, at least in equity, without three subscribing witnesses.

such circumstances would supply it. That in the case before him, two persons who had power to charge the estate, had done it by articles, but referred to the act of a third, merely for the purpose of apportioning; and though that third happened to be a father, it would be the same as if he had been a mere stranger. If, therefore, one should charge his estate with a sum, to be divided as a mere stranger should think proper, by will, the necessity for its being a will conformable to the statute, did not occur; and whether there were two or three witnesses, it was such a circumstance, as, when the intent fully appeared as in the present case, a court of equity would supply.

His Honour added, that it was not necessary to criticise very nicely on the import of the word *duly*; but that where a provision for younger children was thus attempted to be defeated by one who was a younger child, one would lay hold of any circumstance whatever on which any weight could be laid; and supposing the father having no land estate, executed a will, whereby his intent was sufficiently declared, in what manner this should be divided, it was good, though there were no such circumstances as required, whereby any interest was to pass *from him*. There was no occasion to consider, whether the whole must have fallen to the ground, if the father had made no will or appointment, or whether the court would in such case have

interposed for the younger children. There have been cases, where a provision of that sort has been referred to the direction of a third person, which, if not executed, this court has thought proper to direct to be equally divided; but that it was not necessary to determine that, because his Honour was of opinion, that the will, though executed in the presence of two witnesses only, considering it as a will whereby the father passed nothing at all by way of interest from himself to them, but merely as a collateral person, was a sufficient execution of the power (1).

We should not read the above case, without remarking the judge's observation, that even if the force contended for were given to the phrase *duly executed*, "there had been cases in which a court of equity, *under such circumstances*, would supply it." By which his Honour must not be understood to mean, that where a power is given to appoint real estate by a will, *duly executed*, or by will generally, such appointment will have the aid of equity, if it be not executed by a will according to the statute; but that *under such circumstances*, that is, where the subject of disposition is not such as does of itself call for the application of the statute, being *personal*

Some essential distinctions to be attended to reading the above case.

When equity will help a defective execution of a will.

(1) When an act is done under a power, the act is deemed in law to be done by the grantor of the power. 2 Atk. 661. *Middleton v. Crofts*.

estate, or where the power is given to a *stranger*, then the mode of making the will being a stipulatory form only annexed to the power, without which the will would be intrinsically good according to law, courts of equity, in behalf of certain favoured objects and considerations, will supply such little formalities, for the sake of the substantial intention of the parties. But if a power over real estate is to be exercised by will, in as much there can be no will at all of such property, unless it be perfected in the manner prescribed by the statute of frauds, if a will be made without being so perfected, it is as if the power were attempted to be executed by a *totally different instrument* from that to which it was expressly made subject.

The case of *Sayle v. Freeland* and others reported among the chancery cases in Ventris^f, referred to by Sir John Strange, in the case above produced, is not at variance with the principle of this distinction. There the bill was to redeem a mortgage made by the father of the defendant, or to be foreclosed. The defendants by guardian answered, stating that their grandfather was seised in fee, and made a settlement, whereby he entailed the estate, but with a power of revocation by any *writing published under his hand and seal, in the presence of three witnesses*; and the case was, that he made his *will* under his hand and seal, wherein

he recited his power(2), and declared that he revoked the settlement; but the will had but two witnesses, who subscribed their names, though a third was actually present. The testator died, and the lands descended to the father, who made the mortgage; and the defendants claimed by virtue of the entail. But the Chancellor decreed, that the mortgage money should be paid; and first, he said, there was an execution of the power *in strictness*, for the third witness was *present*, though he did not subscribe. But secondly, if there had not been in strictness a good execution of the powers, equity would help it in such a little circumstance, where the owner of the estate had fully declared his intention; further adding, that there was a difference where a man had power to make leases, &c. which would charge and incumber a third person's estate, which sort of powers were to have a rigid construction; but where the power was to dispose of a man's own estate, it was to have all the favour imaginable. Here, we observe, that the power was to be exercised by a *writing*, and not necessarily by a *will*, executed in the presence of three witnesses; and although the party chose to execute the power by a writing, in the form of a will, and that will not such a one as

(2) That a power may be exercised without reciting it. See 1 Atk. 559. *Molton v. Hutchinson*, ib. 441, *Robert v. Morgan*. But see as to the question whether it will be executed by the general words of a will. 3 Vez. jun. 467, *Langham v. Henny*. 2 Bro. C. C. 297, *Andrews v. Emmett*. 4 Vez. jun. 60, *Croft v. Slec*.

would have a testamentary operation under the statute of frauds; yet it was not the less a writing published under hand and seal in the presence of witnesses.

A man cannot by *will* reserve a power of disposing of real estate by a future unattested will or codicil.

But though a man by first passing the land by a sufficient conveyance, may empower himself to make a future disposition thereof by a writing, with one or two witnesses; and under such a power a will, or writing purporting to be a will, if attested according to the terms of the power, will be a good, instrumentary execution of the power(3); yet it has, upon very satisfactory reasons, been determined, that a person cannot by *will* enable himself to make any future disposition of land by any instrument whatever, not executed and attested as the statute of frauds requires, in respect to wills of lands. If a will affects to reserve any power of disposition, such reservation is purely negative in its effect; it *does nothing*; unless perhaps it may serve as a positive expression of its own non-effectiveness, as to certain subjects, or beyond certain limits. Such lands as a

(3) For in such a case the disposition is not testamentary in its origin, but is to be regarded as merely supplemental to, or as directing the operation of the conveyance from which the power springs. But whenever the disposition is originally and substantially testamentary, it is within the statute, and every part of such disposition, whether primary, additional, or supplemental, requires to be executed as the statute directs. *Fearne's Posth.* 43. *Habergham v. Vincent*, 2 Vez. jun. 204. and see the case of *Stangfield v. Habergham*, 10 Vez. jun. 281.

testator does not actually pass or dispose of by a present declaration of his mind, remain in him to be passed or disposed of by a future conveyance or will; but by such only as are competent in law, by the perfection of their respective executions, to the gift or transfer of the property, according to its nature and requisites. And this rule obtains equally in respect to legal and trust estates, for trust estates, are as much within the statute of frauds, with regard to the formalities requisite to the perfection of a will as legal estates, since the same mischiefs would follow from the omission in the one case as the other.

It is established that an instrument, whatever is its form, whether it be a deed poll or indenture, is testamentary in its operation and quality, if it be intended not to operate till the death of the party who made it^s. The circumstance, and not the form, must decide the character of the instrument. Thus, therefore, the deed in the above cited case of *Habergham v. Vincent* could have no other operation than as a testamentary paper; and presented itself, under this *general* character, in three distinct lights—as a codicil—as an exercise of the power reserved by the will—or as an integral and original part of the will itself, by incorporation into its substance.

If an instrument be not intended to have effect till the death of the party, it is testamentary in its operation and quality, whatever may be its form.

^s Moor 177. 2 Leon, part 4, 159, 166. Audley's case, Dyer, 166, s. *Greene v. Proude*, 1 Mod. 177,

A codicil has a *distinct* commencement, and though it is said to be a part of the will, yet it becomes so by *first acting* upon the will, and in a manner drawing it down to the date of its own publication; and can have no operation upon *freehold* estate, either *as part* of the will, or *by its own efficiency*, unless it be attested as the statute directs.

Difference between a conveyance to uses and a will, in respect to the legality of reserving a power of future disposition.

As an exercise of power of appointment, it is met by the rule, that a testator cannot by his will reserve a right to devise freehold estate by a future testamentary instrument, not attested according to the statute of frauds, however practicable this may be under the uses of a conveyance. Where there is a conveyance, and a power is reserved under the uses thereof, the estate is parted with, the land is gone, and the power which is in truth only an executory use, is collateral to the land, and may be limited to be executed by any instrument whatever; by a *deed* or writing, with or without witnesses; for its *specific* operation is not in question, where the terms of the conveyance reserving the power have defined the mode of its execution; though, as we have seen, if it be reserved to be executed by a will in general terms, the party will be understood to have intended a *proper* will, according to the statute. But by his *will*, a man parts with nothing before his death, till which time his will is ambulatory, incomplete, and revocable; he has the same absolute dominion he had before; and if by

any subsequent act he parts with any portion of his estate, whether it be a part of that already devised, or a part affected to be specially reserved for his future appointment, he parts with it *as owner*, and not *instrumentally*, and by virtue of an *original*, and not a *derivative* power.

But the truth seems to be, that every paper to which a will refers must be incorporated originally with the will itself, if real property is to be affected by it, or it can avail nothing, unless it is itself executed according to the statute of frauds. And further, the rule is, that an instrument properly attested, to incorporate into itself another instrument, not attested, must describe it so as to manifest distinctly what the paper is that is meant to be incorporated, in such way that the court can be under no mistake^b. Therefore, it did not appear to the court, in *Habergham v. Vincent*, that the second instrument, although testamentary in its nature, could be incorporated into the will; which referred to nothing actually in existence, but to an intention merely; and it has been sufficiently shewn, that the will could create no power with a special mode of execution. In that case, Mr. Justice Wilson said, that he believed it to be true, and he had found no case to the contrary, that if a testator in his will refers expressly to any paper *already written*, and has so described it that there can be no doubt of the identity, and the will

Every paper to which a will, duly attested, refers, if it comprise a disposition of *real* property, to be effectual as a testamentary paper, must either be incorporated originally into the will, or be executed according to the statute; and such paper, to be so incorporated, must be distinctly referred to and described by such will.

^b *Smart v. Prujean*, 6 Vez. jun. 565.

is executed in the presence of three witnesses, such paper makes part of the will, whether executed or not; and by such reference he does the same, as if he had actually incorporated it. Because words of relation have a stronger operation than any other. But the difference between that case, and the reference to a future intention, is striking: in the former, said the judge, there is a precise intention mentioned at the time of making the will; for the paper makes out the intention at the time: but when a man declares he will in some future paper do something, he says, he will make a will as far as his intention is then known to himself, but he will take time to consider what he will do in future.

With respect, however, to the copyhold estate, which was a subject of the dispositions in the case of *Habergham v. Vincent*, it was held quite clear, by the Chancellor and Judges, upon the doctrine a little before stated, that as the deed poll was capable of being regarded as a testamentary paper, it was sufficient to pass the copyholds, and I apprehend it follows, from the principles of the reasoning just produced, that as a testamentary paper it must have operated as a *codicil*; for it could neither be incorporated into the will as an original part of it, or operate by virtue of the power affected to be reserved by the will.

PART VI.

Wills charging Lands.

WE observe, that in the above-mentioned case of *Habergham v. Vincent*, the counsel for the surviving trustee endeavoured to maintain the competency of the testator, by a will executed according to the statute, to reserve a power of future disposition of land by an instrument not perfected as the statute directs, by analogy to the case of a general charge of legacies on lands by a will duly executed; whereby it has been held*, that a testator enables himself to charge the land with any number of additional legacies, by a subsequent instrument not attested so as to pass lands (1). This, indeed, seems to be established doctrine with respect to legacies, which Lord Hardwicke said was attended with no greater inconvenience than arose from a man's charging his lands by will with the payment of his *debts*,

By a will duly executed, charging land generally with legacies, a testator enables himself to lay any number of *additional legacies* on the land, by a subsequent testamentary disposition *unexecuted*.

* *Masters v. Masters*, 1 P. Wms. 423. and *Brudenell v. Boughton*, 2 Atks. 274. and see the late case of *Rose v. Cunningham*, 12 Vez. Jun. 29.

(1) There seems to be no occasion to prove a will in the spiritual Court to entitle a legatee to recover his legacy out of the real estate, 3 Atk. 361.

which, doubtless, would extend to all the debts contracted during his life. It was insisted, however, that the statute was equally defeated by the privilege of charging land with legacies or debts to any extent by an unsolemn will, where the land has been generally charged by a previous attested will, as by this power of appointing, reserved by a will; for, as to debts it was said, that by a bond, creating a voluntary debt, a testator might circuitously dispose of the whole value of his estate; so likewise, after having generally charged legacies upon his estate by an attested will, he might devise away the whole of his property by any testamentary paper, by creating a charge equal to its value.

Distinction between the case of subsequent legacies charging the land, by virtue of a former will charging them generally upon the land, and the reservation by will of a future power of disposition.

But a convincing reply to this reasoning was given by the Lord Chancellor. His Lordship said, “ that it was supposed to be Sir Joseph Jekyll’s opinion in *Masters v. Masters*, that it might be supported as a power, reserved to the testator, to increase the charge by a future act. That could not be the ground of his opinion. There was a manifest incongruity in the supposition of a power, reserved by a man’s own will, which cannot begin to operate till all power in him ceases. The observation made by Mr. Justice Wilson was unanswerable, that it is not a personal privilege; and that no man can reserve a power to act against the forms which the law has imposed. Therefore, if it were to pass by a testamentary act,

such act must have all the solemnities which the law has directed."

But in a correct MS. note in his Lordship's possession, Lord Hardwicke had stated the ground to be the analogy to the case of debts; which was the ground of the determination. His Lordship added, "that the cases to which he had alluded, were none of them cases of a primary, substantive, independent charge upon the real estate, but a charge upon it in aid of the personal, which was *primarily* charged. Such a charge, whether for debts or legacies, was necessarily uncertain in extent not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating."

"A charge for legacies, therefore (his Lordship said) must be uncertain as to its extent; not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating. Whatever affects the primary fund, varies the amount of the charge. Therefore, though given by a will duly executed, they are revocable by a will not so executed; for the charge upon the land was only for the deficiency of the personal to answer the legacies. If the legacies were taken away, the land would not be affected. If they were increased they would affect the real by diminishing the personal,

which it was in the power of the owner to do all his life. That it was obvious, therefore, from that reasoning, that the statute of frauds did not affect the question as to legacies, because it did not prevent a man from creating by will, a fluctuating charge upon real, in aid of personal property. But that, said his Lordship, could bear no application to a devise of the land itself, or a reserved part of the real not disposed of; nor, as he conceived, to an original charge upon the land; which he should think could not be revoked by a second informal will. If ever such a case arose, it would be a new question."

A sum of money devised out of land is part of the land in equity, and such disposition is within the statutes of frauds.

From *Brudenell v. Boughton*^b, so often referred to in the above-mentioned case of *Habergham v. Vincent*, we collect the following useful distinctions upon the subject. If a sum of money be given *originally* and *primarily* out of the land, such a devise requires as much the solemnities of execution prescribed by the statute, as a devise of the land itself; because the money is regarded in a court of equity as *part of* the land, since it can only be raised by sale or disposition of part of the land; and this is considered as analogous to the rule of law, that a devise of the rents and profits is a devise of the land itself. And if money be so charged upon land by a will with the due solemnities, a subsequent will unattested, or attested by one or two witnesses only, cannot revoke or subtract the charge.

^b 2 Atk. 267.

But where land is made subject to legacies generally, such legacies are nevertheless to be considered as primarily attaching upon the personal estate, so that if there are personal assets sufficient, the land will be exempt, for it is only a collateral security; and by a consequence in reasoning, if the will be revoked as to the personal, the object of the collateral security is gone, and the land remains no longer charged. The legacies given by the first will may be withdrawn by a second unexecuted according to the statute; and by such second will, new legacies may be substituted of a different amount; or, without changing or modifying the legacies first given, additional ones may be given either to the same or different persons^c.

A circumstance to be attended to in considering the subject of these cases, is, that by the first will executed to pass and affect real property according to the requisitions of the statute, the land is effectually made an auxiliary and collateral fund to the personal property in respect of legacies; to this indefinite extent it becomes a pledge, and impressed with the character of personal estate. But it is to be observed, that if a will, properly attested, contains a direction to sell real estates, and out of the produce to pay legacies, such direction does not so stamp this character of personal estate upon the *whole*, or produce so complete and *ultimate* a conversion of the

A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property, as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil.

Vid. *Hannis v. Packer*, Ambl. 556.

To effect this absolute conversion, a clear intention ought to be demonstrated.

land into personalty, as that the surplus, after the legacies are satisfied, may pass by an unattested codicil. To produce this effect, the testator ought, in a will executed and attested so as to pass freehold estate, to manifest a clear intention to have the whole actually sold, or at least should in such will decidedly shew that he contemplates the surplus as personal estate, and intends to bring the *whole* within that description of property. To this limit the cases cited in *Sheddon v. Goodrich*^d, seem to have carried and confirmed the doctrine. What is not *absolutely* converted either in law or equity, but is only directed to be sold to answer a particular purpose, as to pay legacies, for which the testator has directed certain conveyances to be made, retains, as to the surplus, its character of real estate. For the particular purpose to which the produce is destined, the conversion into personal estate takes place, but as between the personal and real representatives it remains real.

It is upon this principle, that if the object for which the conversion was to be made, does not come into existence, and thus no reason arises for any conversion to answer the purposes of the will, the estate *descends*, in the view of a court of equity, *as real*, to the heir at law. If money be directed to be laid out in land, the person to whom the *entire* interest in the land would belong under the will, if purchased, may, before the investiture, elect to take it either as money

^d 8 Vez. jun. 481.

or land, i. e. as personal or real estate. If such devisee makes his will, and describes such interest as money, it will pass without attestation^c; but without such indication of intention to treat it as money, it remains real, and the will to pass it must be attested^f. This being the doctrine on this subject in a court of equity, it follows, that if, after directing an estate to be sold for the payment of *particular* legacies by a will duly executed and attested, a testator might, by an unattested codicil, dispose of the surplus of his property, either the consistency of the courts of equity, which to other purposes have considered such surplus as real, or the positive restrictions of the legislature, would be violated.

If, therefore, an estate were directed to be sold, and all the debts and legacies generally to be paid out of the produce, it seems clear that this would amount only to that sort of general charge which has been so much above considered; and, though pecuniary legacies generally given by an unattested codicil, would, it should seem, according to the above principles, attach as charges *secondarily* upon the land, yet the surplus could not *eo nomine* be disposed of by such unsolemn instrument.

But if a testator, by a will duly executed to pass lands, directs the whole of his *real* and *personal* estate to be sold, and out of the produce thereof

Where a testator shews both the *real* and *personal* estate to be equally in his contemplation, as the funds out

^c 8 P. Wms. 221. note c.

^f Ibid.

of which the legacies are to be satisfied, a revocation effectual as to the personalty, but insufficient as to the real for want of being attested according to the statute, will leave the land still subject to the charge.

certain legacies to be paid, and then by an unattested codicil in terms revokes his will, which revocation, from the want of solemnity, can only operate upon the previous dispositions of the personal estate, a very nice and curious question may arise, whether the legacies are to be considered as gone by the partial failure of the fund, or as remaining charged on the real estate. In the above cited case of *Sheddon v. Goodrich*, this was one of the points, and one on which the present Chancellor expressed a painful degree of difficulty and doubt. The distinction stated by his Lordship appears to be in substance as follows :

Where a testator, in general terms, subjects his real estate to his general legacies, or charges his legacies generally upon his real and personal property, inasmuch as the primary and direct source from which the legacies are to come, will be the *personal estate* (2) the land being regarded in equity as only

(2) The general rule is clear, that the personal estate is liable in the first instance to the payment of debts. But this general rule supposes, that the engagement upon which the debt arose, was primarily a personal contract ; in which case, the personal estate, as having received the benefit, becomes the proper fund out of which the payment should be drawn ; so that if money be borrowed, or a debt be any way incurred, and a mortgage made without bond or covenant accompanying it, yet the mortgage makes it no more than a specialty debt in equity, and the land comes only in aid of the personal obligation upon the simple contract.

The rule also supposes, that it was originally the personal contract of the testator himself, for if an equity of redemption has descended,

secondarily and *eventually* charged as a collateral security to the personal estate, 'if the principal fund

and then the mortgage is transferred, and the heir covenants to pay the money, and dies, still as the mortgage was not originally his, the land, upon the second descent, must bear its own burthen, and notwithstanding such personal contract of the intermediate heir, his personal assets will, upon his decease, be only *secondarily* liable.

The same doctrine holds if the equity of redemption comes by purchase instead of descent. As it was not originally the debt of the purchaser, his heir will not be entitled to be exonerated out of his personal assets; and the order of charge will not be varied, if the purchaser should covenant with the mortgagee, for still it was not primarily his own debt, and his personal contract is considered as being only auxiliary; nor if he covenants with his vendor to save him harmless from the mortgage, for still the purchaser of the equity of redemption is considered as having bought the estate, subject to the charge and with the burthen upon it, to which his covenant has relation as to its principal, and indeed he takes upon himself no more by such covenant than would have been without it laid upon him by a court of equity.

By the majority of the cases, it would appear, that when the debt was originally the debt of the testator his personal assets will not be exempted, except by declaration plain, or necessary implication, contained in, or arising from the will; and that mere parol or extrinsic evidence cannot be admitted in opposition to the above rule. It is agreed that a testator may, if he please, bequeath his personal estate, as against his heir or devisee, clear of debts, but it is left by the cases somewhat uncertain what mode of expression will suffice for this purpose. However, it is settled, that merely charging the real estate or even creating a term for payment of debts is not an exemption of the personal. Upon the whole the personal estate may be said to be first subject. 2. The estates devised for the payment of debts. 3. The estates descended, and this though the estates *devised* are subject to a *general* charge for payment of debts. 4. Real estates specifically devised, subject to and generally charged with the payment of debts. The Reader will find all the authorities on this sub-

is afterwards withdrawn, the rule of *accessorium sequitur principale* seems to apply; and as the land was charged only to help the deficiency of the personal, this latter fund being *withdrawn*, and not failing through *insufficiency*, the testator must be presumed in law to have altered his will as to the legacies. But where a testator shews an intention to bring the real and personal estates into one fund, by directing a sale of both, and the legacies to be paid out of the produce, he seems to have both funds *equally* in contemplation, and not as in the other case, (according to the construction the law puts upon the intention,) to mean primarily and originally a mere personal gift, to be assisted out of the real property if the personal fails. The distinction runs into great subtlety, but is there any distinction *less* subtle that will reconcile the authorities?

The court cannot *see* the intention of the testator with respect to his real property, unless he expresses it by a will, executed according to the statute.

It seems that the effect of the statute of frauds is to prevent the court from *seeing* the intention of the testator to dispose of the real estate (3), if, in truth, he has not done it with the solemnities enjoined by the statute; for in *Sheddon v. Goodrich*, the

ject in Mr. Coxe's note to *Evelyn v. Evelyn*, 2 P. Wms. 659, and the note of Mr. Sanders to *Galton v. Hancock*, 2 Atk. 438, to which may be added the cases of *Hamilton v. Worley*, 2 Vez. Jun. 62. *Woods v. Huntingford*, 3 Vez. Jun. 120. *Buller v. Buller*, 5 Vez. Jun. 517. *Waring v. Ward*, 5 Vez. Jun. 670. 7 Vez. Jun. 332.

(3) Thus in *Buckeridge v. Ingram*, 2 Vez. Jun. 652. the Master of the Rolls (the late Lord Alvanley) observed, "that he *could not read the will* without the word 'real,' in it; but he *could say*,

codicil declared an intention to make a new disposition of the real as well as the personal; but as it could only have the effect for want of execution, of revoking the charge of the personal, the land was construed, notwithstanding the contrary intention expressed, to remain onerated, upon the principle of the distinction above attempted to be stated, between the case where legacies are charged upon a mixed fund, and where they are wholly issuable out of the personal in the first place, the real being meant only to come in aid as a supplemental and secondary resource. And this a testator will be construed to mean, unless he plainly expresses or indicates a contrary intention^s.

In the case, however, of *Buckridge v. Ingram*^b, where a testator, by a will duly executed, gave an annuity to his daughter, charged on all his estates, both real and personal, and by codicil not attested, gave his real and personal estate to his mother for life, the personal estate only was held by this new disposition to be discharged from the annuity, or in other words, the annuity was revoked as to the per-

^s Vide *Ancaster v. Mayer*, 1 Bro. C. R. 454.

^b 2 Vez. Jun. 652.

for the statute enabled him, and he was bound to say, that if a man, by a will unattested, gives both real and personal estate, *he never meant to give the real at all.*" In *Sheddon v. Goodrich*, Lord Eldon noticed the accuracy with which Lord Alvanley expressed himself as to that point.

sonal estate, but remained a charge upon the real; and the present Chancellor seems to have approved of that judgment¹; who says that "Lord Alvanley, as he understood upon conversing with him, proceeded upon this, that it was not the case of a legacy given, as in *Brudenell v. Boughton*, and that legacy altered, modified, or extinguished by a subsequent testamentary paper; but a charge created upon two funds; and the testator, by a subsequent paper, withdrew, not the gift of the thing, but one of the funds, which by the former paper was made liable to the payment of that charge, still leaving a subsisting demand; for, being given out of the real as well as the personal estate, the gift out of the real remained, though that out of the personal was gone; not because the thing given was destroyed, but the fund out of which it was given." If the presumption of adding any thing to his Lordship's remarks on the point in *Buckeridge v. Ingram*, may be excused, it might be suggested, that the *power of distress* accompanying the annuity in that case, seemed to mark the real property as an *original* fund in the testator's contemplation for producing the annuity.

Devise of a rent
out of land
must be by will,
attested by three
witnesses,

In the early case of *Hyde v. Hyde*², which appears to have been the first case upon this subject, Lord Chancellor Cowper observed, that these legacies charged upon land by an unattested codicil, were

¹ 8 Vez. Jun. 500.

² 1 Eq. Abr. 409.

not devised out of the land like a rent, but were only secured by land, which before was well devised. And the same Chancellor clearly held, that a rent out of freehold would not pass but by a will attested by three witnesses. So Mr. Justice Buller¹ put the case as to rents strongly thus, "It is clear upon the statute, that a rent cannot pass without three witnesses; for the statute says, '*lands and tenements*,' and a rent is a tenement; and if a tenement could pass without witnesses, it would be in direct opposition to the act." Whatever comes properly within the description of a tenement, or to use the words of the Master of the Rolls in *Buckeridge v. Ingram*², wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or, as it is expressed by Lord Coke, exerciseable within it, it is that sort of property which the law denominates real, and cannot pass without three witnesses." It seems not to be doubted, therefore, but that tolls³, where they are not for terms of years only, navigation shares⁴, commons, the profit of a stallage, petty customs⁵, market, fair, or piscary, which are the subjects of dower⁶, are within the clauses respecting the execution and revocation of wills. But in *Stafford v. Buckley*⁷,

Same doctrine as to tolls, navigation shares, commons, profits of a stallage, petty customs, market, fair, piscary.

¹ 2 Vez. Jun. 232. ² 2 Vez. Jun. 663-4. ³ 2 Blackst. Com. 20.

⁴ *Drybutter v. Bartholomew*, 2 P. Wms. 127. *Buckeridge v. Ingram*, 2 Vez. Jun. 652.

⁵ *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. *Negus v. Coulter*, Ambl. 367.

⁶ Co. Litt. 19, 20.

⁷ 2 Vez. 170.

Lord Hardwicke held an annuity in fee, granted out of the $4\frac{1}{2}$ per cent. duties, upon goods exported from the West Indies, to be a *personal* hereditament; and in *Lady Holderness v. the Marquis of Carmarthen*¹, it was held by Lord Thurlow, that an annuity charged upon the post-office, till a sum to be laid out in land should be paid, was a personal annuity; and the inference is, that such property may be passed by a will not attested by three witnesses.

PART VII.

Attendant Terms.

*Terms attendant upon the inheritance are within the statute.

TERMS of years will pass (1) by a will unattested, but terms attendant on the inheritance, are, as to the equitable interest in them, within the statute, though the legal estate is exempt from its operation. The case of *Whitechurch v. Whitechurch*² will explain this point. Edward Whitechurch took a mortgage of

¹ 1 Bro. C. R. 377. ² 2 P. Wms. 236.

(1) But they cannot be *created* but by a will attested, because the *creation* of a term affects the *real* estate. The statute of frauds takes notice of all lands deviseable by the statute of wills or by the custom of Kent, and which shews that only freeholds of inheritance are within it, for terms of years are not within the statute of wills, nor devisable by custom. *Attorney General v. Graves*, Ambt. 155.

Batcomb Lodge from one Bisse, for 500 years, to commence from the making, for securing the sum of 200l, and interest, and afterwards took another security of the same lands from Bisse, the mortgagor, for 1000 years, in the name of another person, but in trust for himself, to commence also from the making. After this Edward Whitechurch purchased the inheritance of the premises in his own name, and having no wife or issue male, made his will entirely in his own hand-writing, whereby he devised the premises to his nephew, being the son of his younger brother Joseph Whitechurch, for his life, remainder to his son Edward Whitechurch, and to the heirs male of his body for ever, and made his brother, Joseph Whitechurch, his executor and residuary legatee.

It happened that this will, (though intended to be perfected as such) by reason of the testator's sudden death, had no date, nor any name subscribed thereto, nor was the same attested, but the executor had proved it in the spiritual court, and assented to the devise to the nephew; whereupon the elder brother's daughter, who was heir to the testator, brought her bill, in order to compel the executor and the devisee to assign over the term to her.

It was objected for the defendants, that the executor had assented to the devise, and that the will, though not attested by three witnesses, was, however, good at law to pass this term of 500 years,

which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion and not as a grant of a future interest, (for it was admitted, that a future interest would not prevent a merger) but this grant of 1000 years, being to commence from the making, did pass the reversion for 1000 years; which was acceded to by the court.

Then if this will would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose to disappoint the will, especially when it was in favour of so near a relation as a nephew of the testator, and one of his own name, and all this for the sake of one not more nearly related; of one, who, on her marriage, would probably change her name. It was furthermore added, that in all cases between volunteers, (as the heir and devisee were here) he that had the law on his side used to prevail.

But it was decreed by the Master of the Rolls, that as this was a term which would have *attended the inheritance*, and in equity have gone to the heir and not to the executor, in which respect, it was to be considered *as part* of the inheritance, so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term; that though it was true, such a will

as in the present case would be sufficient to pass a term in gross, yet it should not pass a trust of a term attendant on an inheritance. That a will not attested as the statute of frauds requires, should not pass any estate of which the heir, as *heir*, would otherwise have had the benefit. That if the devisee of the land had brought a bill against the executor and heir, to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee; and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper. Besides, the court observed, that it was the intention of the testator in the present case, not to pass the term *only*, but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first and other sons in tail. Though as to this, it was said to be extremely hard, that because quite so much as was intended could not pass, therefore, the devisee should be deprived of that which might lawfully pass, and which was a less estate than was intended him, or, because *all* could not pass, therefore nothing should. However, for the above reasons, the court decreed the devisee and executor to join in assigning the term to the plaintiff, the testator's heir at law, but no costs on either side; this decree was afterwards affirmed on an appeal by the Lords Commissioners Gilbert and Raymond.

When this cause was reconsidered on the appeal before the Lords Commissioners Gilbert and Raymond^b, Gilbert Baron was of opinion, that this was a term attending the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance, and that it would be very dangerous to all the inheritances in England, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such.

Now, in the principal case, if this should be construed a term in gross, then it was such a chattel interest as might pass by the will, though all the solemnities required by the statute were not observed; but if it was a term annexed unto, and attending the inheritance, it could not pass by this will in any other manner than the inheritance would pass. That it had been allowed at the bar, that the term for two thousand years was annexed to the inheritance, but it was said, that the term for five hundred years was not; but no reason was given why there should be such a difference between these two terms, that one should, and the other should not attend the inheritance: and certainly it could never be said with any colour of reason, that, where a mortgagee of a term of years purchased the inheritance, that such term, when in himself and un-

^b 9 Mod. 127.

merged, should go and descend in a course different from the inheritance; for it was the constant and uniform construction in that court, that such a term shall be annexed unto, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person^c.

But Lord Commissioner Raymond differed from Baron Gilbert in the view which he took of this doctrine. He was of opinion, that where a term comes to an executor, by implication, as a chattel interest, or to a devisee by a general devise of all his chattels; or where it vests in an administrator, generally, for want of a will; in such cases, the heir at law would be competent to apply to this court to have the term assigned to another, to attend and protect the inheritance; but that, since it was agreed on all hands that the term passed at law, it was a question, whether that court could take it from him to whom it was devised, in favour of the heir at law, who was a volunteer as well as the devisee?

That it was true, where a term was *expressly limited to attend the inheritance*, there, though the testator likewise *expressly* devised it to another, it would not pass; but where it attended the inheritance only by construction or operation of law, or in an equitable notion, as a term brought in and

^c Et vide *Villiers v. Villiers*, 2 Atk. 71.

assigned by creditors, or terms raised for children's portions, or for other particular purposes; there, if the testator *expressly* devised such terms, they would pass. For where a man had a term for years, which only by intendment of law attended the inheritance, certainly he had a power to sever such a term from the inheritance; and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but it became a term in gross; and why should not a man have the like power to do the same thing by will, if he thought fit. But as in that will there was no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there were sufficient words to pass it in general; it was to be considered, whether such *general* words should, after the death of the testator, sever that term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

Comments on
the doctrine laid
down by Lord
Commissioner
Raymond in
Whitechurch v.
Whitechurch.

The distinctions taken by Lord Commissioner Raymond may be more readily understood, by being stated as follows: a term of years may have become attendant upon the inheritance after all the express purposes of its creation are satisfied, by consequence and operation of law, or, after such satisfaction, it may have expressly received this ulterior destination by actual assignment for this purpose. If a term be in the predicament first above supposed, and a person, having in himself such term un-

merged, by reason of an intervening reversionary term outstanding, or by reason of the legal estate in the inheritance being in another for his benefit, *expressly devises* the term by a will capable only of passing *chattel* interest, the term will be severed from its *accidental* connection with the freehold, and will go to the devisee as a beneficial interest, or, in other words, will pass in equity as well as at law. But if it be not so *expressly* devised, the heir at law will be entitled beneficially to the term for the protection of the inheritance; or in other words, the equity in the term will descend as *a part* of the inheritance for want of an execution of the will sufficient to pass freehold estates.

But supposing such satisfied term to have once received an express destination to attend upon the inheritance, then it seemed to the Lord Commissioner to be immaterial whether it was *expressly* and *by name* devised by the testator, or included under a *general devise of his chattels*, or suffered to devolve to the executor or administrator; it being that judge's opinion, that where such *express* limitation had been made, it would not pass by a will unattested, though the testator *expressly devised it to another*.

The whole of this doctrine of the Lord Commissioner, who delivered his opinion to the effect last above-mentioned, turned upon a distinction between a term assigned upon an *express declaration of*

trust, to attend the inheritance, and a term *constructively so attendant* by implication and operation of equity. But the case of *Willoughby v. Willoughby*⁴, has clearly negatived any such distinction between estates expressly made attendant upon the inheritance, and those so considered by construction of equity; in which case it was also laid down by Lord Hardwicke, that the term, in *whatever* manner it may have become attendant, may be *disannexed* and turned into a term in gross at any time, by the owner of the inheritance.

PART VIII.

Things affixed to the Freehold.

As to wills affecting things affixed to or growing upon the freehold.

A WILL must operate upon the testator's property according to the state it is found in at his death; therefore, unless an actual severance has taken place in the life-time of the testator, he is incapable by his will, unattested, of *devising* the appendages of the freehold, in separation from the subject to which they adhere. And, therefore, according to Perkins, title *Devises*, from whom Swinburn^{*} has copied the doctrine, those things, which after the death descend to the heir of the deceased, and

⁴ 1 T. R. 769.

^{*} Part II, sec. 6.

not to his executor, cannot be devised by testament, except in cases where it is lawful to devise lands, tenements, or hereditaments. So the law stood before the statute of frauds, and so I apprehend it remains in relation to the new requisites to a devise of freeholds introduced by that statute.

Therefore, if a man seised in fee of lands bequeath, ^{Trees} by will sufficient only to carry personal estate, all his trees growing upon his land at the time of his death, such devise is void. But if he devise away ^{Corn growing} the corn growing upon the same land at the time of his death, such devise will be good by a will unattested. The trees are parcel of the freehold till actually severed; and unless devised away by a will applicable to freehold, descend, together with the land, to the heir: but the corn which was sown by the testator shall go to the legatee of his personal estate, as goods and chattels^b. If there is no personal bequest that will apply to it, then an express devise of the lands themselves, though no mention is made of the corn, will give it to the devisee, as the law holds, in such case, that the intention of the testator was to pass the land, together with its fruits^c. But if there is neither bequest of the corn, nor devise of the land, it will go to the executor or administrator and not to the heir^d.

^b Fisher v. Forbes, 2 Eq. Ca. Abr. 392

^c Winch 51. Cro. El. 61, 461. Roll Abr. 727. and see Cox v. Gedsalve, 6 East. 604. n.

^d Gilb. Evid. 247.

Thus it has been always held, that if a man be seised of land in right of his wife, and sow the land, and devise the corn growing thereon, and die before the corn be reaped, the legatee shall have the corn, and not the wife. The reason of the law in which particular is, that the corn is *fructus industrialis*, and he who sows it has a kind of property in it divided from the land gained by the *very act of sowing it*^e. But if one joint-tenant sows the land, and dies before it is reaped, the corn survives with the land (1), because he gained no exclusive property by the act of sowing it; for he had no exclusive property in the land. But if A. seised of land, sow it with corn, and then convey it to B. for life, remainder to C. for life, and then B. die before the corn is reaped, C. shall have it, and not the executors of B. though his estate was uncertain, for the reason of industry and charge fails. And if B. and C. both die, then the lessor who sowed the corn shall have it (2). But the law is otherwise in respect to

^e Hob. 132.

(1) Cro. El. 61. Dyer, 316. *a.* But if one of the joint-tenants occupies the land alone, by the consent of the other, and takes the profits alone to his own use, it seems that if he sows the land, he may devise the standing corn away from the survivor, as *fructus industrialis*, and such devise will be good and effectual, without witnesses; for it is said, that such assent to his sole occupation of the land amounts to a lease at will, and, as such, gives a title to emblements; but such assent by the companion must be express and positive. Cro. El. 314.

(2) Cro. El. 61. For the doctrine as to emblements, see Perk.

trees, and also the grass and herbage not separated from the ground at the time of the death of the testator; for this is not *fructus industrialis*; and, therefore, as a tenant for life cannot by a will properly executed to pass freehold estate make any disposition thereof to operate after his death, so neither can the owner of the land in fee simple pass it in separation from the land by a will executed only to pass chattel and personal property. And it will be the same if the natural product is encreased by sowing of hay-seed, or other assistances of cultivation^f.

Grass and herbage.

With respect to heir-looms (3) which by custom have gone with a house, they cannot be devised separately *by the owner of the fee simple, even by a will executed to pass freehold estates*; for the will does not take effect till after the death of the testator, and by his death the heir-looms, by ancient custom, are vested in the heir; and the law prefers the custom before the devise^g.

Heir-looms.

Things which belong to the realty by simple annexation to the freehold, may not be devised away by a will *unattested*, unless they were separated before the death of the testator, for they are as much freehold as the land itself, until such separa-

^f Co. Litt. 185. b.

^g Roll. Abr. 727.

sect. 530. Co. Litt. 41. 45. Hob. 132. Roll. Abr. 727. Gilb. Evid. 246. Com. Dig. tit. Biens, G. 1. c. 2.

(3) *Loom* is a word of Saxon original, signifying limb or member. Spelm. Gloss. 277.

tion takes place; and of this description are doors, windows, and even furnaces and ovens, and tables and benches, if fixed and mortised in the earth; and so, in general, all those appendages of the freehold, which a tenant cannot remove or destroy, without being liable to punishment for waste^b.

Deer in a real ancient park, fishes in a pond, doves in a dovehouse, and things in the like situation, though personal chattels, are so appropriated to the inheritance that they accompany the land wherever it vests, whether by descent or purchaseⁱ; and so the charters, court rolls, and muniments of the estate, pass together with the land^k; in like manner monuments, coats of armour, ensigns, and escutcheons, go to the heir in the nature of heir-looms: but the owner may, *during his life*, sell and dispose of these things if he please, as he may of the trees on the estate; and he is at liberty, as being complete owner, to do any injury to them without being accountable.

Pictures, plate, books, and furniture cannot be perpetuated in a course of descent, or made to go with the family mansion. When they are left, as is often the case, to be enjoyed by those who shall be in possession of the family residence, as far as law or equity will permit, the absolute interest, subject to the interest for life which may be created in

^b 4 Rep. 64. et vid. Lawton
p. Lawton, 3 Atk. 12.

ⁱ Co. Litt. 8.

^k Bro. tit. chattles, 18.

will vest in the person who is entitled to the *first* estate of inheritance, whether in tail or in fee, and upon his death will devolve upon his personal representatives¹

PART IX.

Mortgages.

WE have seen, a little above, in the case of attendant terms, an instance wherein chattel interests in land, though devisable *at law* by a will not executed and attested according to the statute, are from the particular view taken of them in courts of equity, deemed by those tribunals to be as much the objects of the requisitions of the statute as estates of inheritance. The converse of this doctrine holds in respect to *mortgages*; this interest being regarded in courts of *equity* as entirely *personal*, a will unattested seems clearly to be capable of passing the beneficial right to the land; so that the devisee, under such a will of the land mortgaged, would be permitted by the court to use the name of the heir to compel payment of the money, or make the pledged estate his

Mortgages in equitable consideration are not within the clauses respecting wills in the statute of frauds.

¹ 1 Bro. C. C. 274, 3 Bro. C. C. 101.

own by foreclosure. In equitable contemplation the *estate* in the land remains in the mortgagor, while, in respect to the interest of the mortgagee, the land takes the character of personalty as following the nature of the debt, to which it is a collateral security; in so much that if a mortgagee, after making his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively, under the general words lands, tenements, and hereditaments, contained in the will, but will go as an *acquisition*, or *purchase*, subsequent to the will, to the testator's heir at law*.

In the consideration of equity, therefore, mortgages do not seem, as to the beneficial interest, to be within the words 'lands and tenements,' in the fifth clause of the statute; nor will such interest in general pass by a devise of lands, tenements, and hereditaments (1). But if a mortgagee by

* Vide *Casborne v. Scarfe*, 1 Atk. 605. *Sir Litton Strode v. Lady Russell*, 2 Vern. 621. *Winn v. Littleton*, 1 Vern. 3. 2 Vent. 351. 6 P. Wms. 61. 2.

(1) 2 Vern. 621. L. being seized of several manors and lands, and also of mortgages in fee, which were forfeited, and of a great personal estate, having no issue, made his will, and after devising part to his wife for life, and other legacies, "gave all other *his lands, tenements, and hereditaments*, out of settlement, to his nephew." And one of the questions in the case was, whether these mortgages passed by the will under the general words, *lands, tenements, and hereditaments*? It was held by the Lord Chancellor,

his will *expressly* devises the *mortgaged lands*, or makes a general devise of his lands, having only mortgaged lands, it should seem, that the interest in the *money* is thereby carried to the devisee, and the right in equity to the land, as the pledge, accompanies, although the will be not attested.

It is clear that the mortgagor cannot pass his equity of redemption by a will unattested; and if the mortgagee were also under the same restriction, the statute would cut two ways, and equity would be

the Master of the Rolls, Lord Chief Justice Trevor, and Justice Tracy, that the mortgages in fee, though forfeited when the will was made, did not pass by these general words. But the decree in that case, as it is stated in the Register's book, B. 1707, fol. 510, takes no notice of any mortgages, except those whereof the testator, after making his will, had purchased the equity of redemption. The case of *Winn v. Littleton*, 1 Vern. 3, affords a *particular* ground for construing the mortgaged lands out of the general words. And according to Reg. lib. 1680, fol. 452, the decree leaves it equivocal, whether the party directed to convey was devisee or heir. Upon the whole, there seems to be no good ground for holding mortgaged lands *not* to pass by the general words uncontrouled in their effect by inference from the particular dispositions. The case *ex parte Bowes*, stated in the note to *Casborne v. Scarfe*, 1 Atk. 605, edit. Saund. has been denied in later cases, and the doctrine seems now settled, that the *intent* may restrain the *generality* of the expression. Vid. *But. Co. Litt.* 203. b. n. 96. and *Duke of Leeds v. Munday*, 3 Vez. jun. 348. Where the devise is to executors, or trustees, for paying debts, the intent is promoted by construing the mortgaged lands to pass. Vid. *ex parte Sergison*, 4 Vez. jun. 147.

inconsistent with itself, in as much as such double operation of the statute would imply the existence of the real estate at the same moment in two persons distinctly. The truth seems to be, that the mortgagee's interest is contemplated in this court rather as a *right* than an *estate*, while the equity of redemption has rather the quality of an *estate*, than a *right*. Thus it was said by Lord Hardwicke, that in the eye of a court of equity, the equity of redemption was the fee simple of the land^b, and though Sir M. Hale called it an equitable right, yet he added, that it was inherent in the land, binding all persons coming in the post, or otherwise (2).

^b 1 Bl. Rep. 145.

But this equitable consideration of a mortgage, as personal estate, is not permitted to narrow the effect of the statute of mortmain.

(2) Hard. 469. Yet there are bounds to this doctrine of transmutation of estates, in the equitable notion of a mortgage. Thus, if it were applied to the statute of mortmain, it would be opposed to the obvious purposes of the legislature in the provisions of that law. It was, therefore, determined by the Master of the Rolls, (Sir John Strange) in the *Attorney-General v. Meyrick*, 2 Vez. 44. that where a mortgagee in possession devised the benefit of his mortgage to a charity, it was within the mortmain act. And his honour would not allow the distinction attempted to be made on the part of the relator, between a devise of the mortgaged premises, and of the money due on mortgage. Nor did the circumstance of the mortgagee being in possession under an *habere facias possessionem*, seem to weigh at all in the case, the reason of the determination being, that the devisee would acquire a right of making the pledged estate his own by foreclosure, unless the money were paid. His Honour observed, that by a gift of all one's mortgages to A., the whole beneficial right passes to him; and be the legal estate either in the heir, or executor, each would be considered as a trustee for

PART X.

Election in Equity.

IT is to be observed, that a will of real property, not executed and attested as the statute directs, is classed among those acts which the law holds *to all intents and purposes void*; so that neither courts of equity or law will pay regard to the intention of the testator, unless he has given it effect in the manner dictated by the legislature. Upon this principle, such unexecuted will

An unexecuted will is not even of force to raise a case of *election* against a person taking a benefit in the personal estate by the same will.

A., who would be permitted by the court to use their names, to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, then would it be equally so, though the devise was, in phrase, of *money due on mortgage*; where, unless the Court construed it to pass the whole interest of the mortgagee, it would be in effect a void devise. It had been rightly compared to a devise of rents and profits, by which the land itself would pass; that such a construction ought to be made by the court, as would be most effectual to repel the mischief, and advance the remedy. Therefore, if this devise tended to let in the mischief intended to be prevented, it was the duty of the court to guard against its taking effect. He was of opinion, that the devise came within the express words and plain intent of the statute; the design of which was to lay a restraint on every method, whereby land might possibly come to such hands, unless by the manner therein prescribed; but seeing that it would not sufficiently answer the intent of the legislature, if confined to land,

is not even of force in a court of equity to raise a case of election against a person taking a benefit in the personal estate^a. In *Hearle v. Greenbank*^b, D. W. devised all his freehold, copyhold, and real estate, whatsoever and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators, and assigns, in trust, to apply the residue, after paying their own charges, to the separate use of his daughter M. W., a married woman, during her life, to be at her disposal; not subject to the debts or controul of her husband; her receipts to be good, and to be permitted by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she should think fit; and gave to the same trustees, whom he made joint executors, his personal estate, in trust, for the sole and separate use of M. W., and to be at her disposal,

^a 7 Vez. jun. 372.

^b 1 Vez. 198.

it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of lands. But was there no other way whereby the interest in land might come to a charitable use? Yes, money due on mortgage was a charge and incumbrance on the land, the payment of which depended on the pleasure and ability of the mortgagor: therefore, parliament had by express words taken in that by a third clause; the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in. The meaning was, that you shall not give to a charitable use that which is or *may be* a charge upon land, though not so at the time of the gift.

and not subject to the debts or controul of the husband. M. W. then under the age of twenty-one, but above seventeen, made her will, and thereby, in pursuance of her power in her father's will, gave 8000l. to her daughter Mary, when she attained the age of twenty-one; she then devised the residue of her real and personal estate to the plaintiffs, the two Hearls, their heirs, executors, and administrators, for ever.

The bill was brought by the plaintiffs to have the appointment made by M. W. of the real estate in their favour established; but the court considering the will to be void by reason of the nonage of the mother, adjudged it a bad execution of the power: then the question arose, whether the heir at law could take the legacy of 8000 l. under the will, which was well devised, (the testatrix being of a capacity to dispose of personalty), and at the same time claim the lands by descent, against the appointment, or was put to an election, upon the rule of not disputing a will in any part under which you claim. And the case for the heir was thus put at the bar. It was said, that the rule was true, when properly understood, that wherever a person claims under a will; and by the same will, *properly executed*, land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute the title; since the will manifests the intent how the whole should go; but that this rule did not go to make good what

was in effect *no will*: that the case under consideration was one in which there was *no will*; it was not the case of a will impeached for want of title in the testator; it was like a devise to a charitable use, since the statute; it was not want of title, but want of capacity to make any will at all of real estate.

To this distinction the Chancellor seemed to accede. His Lordship observed, that as to the equity of the plaintiffs from the claim of the 8000l., it was true, it was determined in *Noys v. Mordaunt*^c, that if lands in fee were given to one child, and to another lands entailed, it is meant they should release to each other, and the court had gone farther since—to the case of a personal legacy. But still he was of opinion, that this differed from all those cases, and that the heir at law was not obliged to make her election, for in the case before him *the will was void*; and that where the obligation arose from the *insufficiency of the execution, or invalidity* of the will, there was no case where the legatee was obliged to make an election; for there was *no will* of the land.

And his Lordship put the case of a devise by a testator of a legacy out of land to his heir at law; and of the land itself to another; where, if the will be *not executed according to the statute of frauds* for the real estate, the court will not oblige the heir at law, upon accepting the legacy, to give up the

^c 2 Vern. 581.

land. That such a case differed from *Noys v. Mor-daunt*, in the reason of the thing; there the testator devised some lands which were, and others which were not, his own; and the court said, that the devisee should suffer the lands to pass, as if they were the devisor's own. But in the principal case, whether the lands were the testator's own or not, they could not pass by the will.

But in *Boughton v. Boughton*^a, a distinction was taken as to this point, by the same Chancellor who determined *Hearle v. Greenbank*, which has been recognized and confirmed by subsequent authorities, though with some remarks upon its refinement and subtlety. In this case of *Boughton v. Boughton*, it was held that a legacy to an heir, *upon the express condition* that he did not dispute the will, would put the heir to an election, either to accept the legacy, or the lands devised away, although the will was not executed according to the statute. The case was as follows: A freeman of London devised his real estate to his younger son, Stephen Boughton, and all his personal estate among his children; among the rest, 1,200*l.* upon some contingencies to Grace, the daughter of his eldest son; adding this clause, "if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the

But if in such unexecuted will there is a legacy to the heir, upon condition that he did not dispute the will, he is put to his election.

^a 2 Vez. 12.

codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give it to my residuary legatees;" the testator underwrote to this instrument an attestation in the common form, but it was not subscribed either by himself or by any witness: there was a codicil, without date, but signed by him, therein taking notice of and reciting, that in further consideration of this his last will, he made a codicil thereto, and gave directions therein.

Grace, by the death of her father, became heir at law to her grandfather, and so entitled to whatever he left to descend, or which ought to descend, from the invalidity of his disposition. She being an infant of tender years, this bill was brought by Stephen, the youngest son of the testator, and devisee of his real estate, in order that she might make her election, whether she would have the 1,200 l., or the land which happened to descend to her; for that she could not claim both; but, if she chose the legacy, she must let the real estate go according to the intent. The point is so particular, and the Chancellor's judgment so luminous and discrimi-

nating; that I have thought it best for the reader to lay it before him at some length.

His Lordship said, he was satisfied that the infant ought not to take the benefit of the personal legacy, without at some time or other waiving any right to the descended lands; and that it was very different from *Hearle v. Greenbank*. The testator had made one instrument, in which he had used words, expressions, and clauses, relative both to real and personal estate; and in it was contained a clause, importing in words, though not by force of the instrument, to be a devise of the real to the plaintiff, giving 1200l. to his grand-daughter, and taking upon him to dispose of his whole personal estate among his children, who would not be bound thereby, as he was a freeman. He then added the express clause which was the sole ground of distinction between this and other cases; and in the codicil, took notice of that very instrument as a will. The codicil was signed, and put that difficulty, which otherwise might have arisen from the imperfection of the instrument, out of the question. But notwithstanding this, it was a will only by force of the instrument, to pass *personal* estate; for neither the will or codicil was so executed as to pass real estate.

The plaintiff insisted, that the defendant, having a legacy by the will, which was undoubtedly good, should have no benefit thereof, unless she suffered

the disposition of the land to take effect. In *Noys v. Mordaunt*^e, (which was the first case) the testator was disposing of land. The subsequent cases, till *Streatfield v. Streatfield*^f, were all of a devise of real estate. Had the rule gone no further, but been confined to real estate, this objection had never risen, because the instrument must be effectual, as well to one real estate as another; so that if they had both been real estates, this difficulty could never have arisen so as to make the point come into question. Lord Talbot went so far as, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to the tenant in tail, to consider it as an implied intent, that whoever took by that will, should comply with the whole; so that he put the party to an election; but neither in *Jenkins v. Jenkins*, nor in *Streatfield v. Streatfield*, was there a question of the *defect of the instrument*.

Then came *Hearle v. Greenbank*, which was the first case, in which the difficulty arose upon the *defect of the instrument*. In which case his opinion was, that there was no ground for the court to imply a condition to abide by a will of land, when there was, in fact, no will; and that it would be dangerous to break in upon the statute of frauds, by making an estate to pass by an instrument not sufficient to pass real

^e 2 Vern. 581.

^f Cas. Temp. Talb. 176.

estate; and *that*, not by the words of the testator, but by a condition implied by construction of the court; therefore, it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator, who might leave it with that very view. But the question was, whether the case before him did not differ from that by reason of the express clause in the will. It had been very candidly admitted, that if there was no devise of a real estate, but a personal legacy was given on an express condition, that the legatee should not enjoy it, unless within a certain time he conveyed a real estate, whether coming from the testator or not, he should not enjoy it but on those terms; the lands not passing by force of the will, but by the operation of the particular clause stipulating the condition. The legatee had it in his power either to part with the land, or not; if he chose not to part with the land, he forfeited the condition; for any lawful condition might be annexed.

The case might be put a little farther, his Lordship said, (though it was almost the same as the present) as, suppose in the same instrument there was a devise both of real and personal estate, the will executed only to pass the personal, and not the real; but a condition annexed that the personal legatee should permit the same persons, to whom the land was given, to hold to them and their heirs: the condition annexed would take place, though the devise was void as to the lands according to the sta-

tute of frauds; for the legatee could not take it in contradiction to the testator's words; and the devise in the principal case amounted to the same, as if the testator had annexed a condition to permit Stephen to enjoy the land. The court must put a reasonable construction, which was, that none of the devisees should receive any benefit by the will, unless they suffered the whole instrument to take effect; not having regard to the validity or force of it, according to the statute of frauds, but to the clauses and expressions used. In *Hearle v. Greenbank*, there was no condition expressed in the will; it rested singly on the construction the court was to make, upon the implied condition that those claiming benefit by it, should suffer the whole to take effect; and then it must necessarily refer to the validity of the will; for it was rightly argued, that the will could not be read so as to support a disposition of real estate, not being an instrument for that purpose.

In that case, when the court was to make such a construction by implication from the force of the instrument itself, the court must see the will, and could not take notice that it was a will of real estate; but in the case before him, where there was such a condition annexed to a personal legacy, the court must consider every part of that legacy, whether it had relation to real estate or not. You must read the whole will respecting the personal legacy, let it relate to what it will; which was a substantial

difference, his Lordship said, and would prevent his going so far as to break in upon the statute of frauds, and at the same time would attain natural justice, which required, as far as might be, such construction to be made, otherwise the intent of the testator might be overturned.

But, as there might be a difficulty how to carry the will into execution, (for being an infant of tender years, she could not judge for herself, nor could the master judge for her, it being on several contingencies, so that until she came of age, no election could be made,) his Lordship said, the plaintiff must till then receive the rents and profits of the estate, subject to further order of the court, but must be restrained from committing waste. If the infant should elect to have the land, then whatever the plaintiff should be entitled to as his orphanage part of the testator's personal estate, would be liable to make satisfaction for what he should have received out of the rents and profits of the real, as the court should direct.

The distinction taken by Lord Hardwicke, between the cases of *Hearle v. Greenbank*, and *Boughton v. Boughton*, was recognized and adopted by Lord Kenyon, in *Carey v. Askew* (1), and of which

(1) The case is reported in 2 Brown, C. C. 58; but the point under consideration in the text only appears to have made a part of

the Chancellor gave the following account, as to the point now under consideration, from his own note, "I have looked at my own note of *Carey v. Askew*. Lord Kenyon there said, the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an *express condition* to give up a real estate, by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, and he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that, if there was nothing in the will, but a mere devise of real estate, the will was not capable of being read as to that part; and unless the legacy was given so that the testator said expressly, that the legatee should not take, unless that condition was complied with, it was not a case of election. The reason of that distinction, if it were *res integra*, is questionable."

It seems that if a man have leaseholds and freeholds, and devise all his *lands and tenements* by a will unattested, the leaseholds will not pass.

One more point occurs to me as proper to be mentioned, before this part of the subject is concluded. It was held in the case of *Rose v. Bartlet* (2), in the eighth year of Charles the First, that if a man have lands in fee, and lands for years,

it, by the notes of it referred to by the counsel for the heir at law, and by the Chancellor, in *Sheddon v. Goodrich*, 8 Vez. jun. 481.

(2) Cro. Car. 293. pl. 3. The authority of this case has been submitted to (as Mr. Cox observes in his note to *Addis v. Clement*,

and devises all his lands and tenements, only the fee simple lands pass, and not the leasehold estates. But if a man devise all his lands and tenements, having leases for years, and no freehold, the leases for years will pass; for, otherwise, the will would be merely void^s.

And if a man devise all his lands and tenements *at a particular place*, and have only leaseholds answering to the local description, upon the same principle the leaseholds will pass. But what if a testator have both fee simple and leasehold lands at a particular place, and he makes a will, devising all his lands and tenements at that place, by a will not executed to pass freehold estates, but duly proved in the ecclesiastical court, and sufficient to pass leasehold property? As in such a case the freehold cannot pass, will the leaseholds be carried to the devisee? This was one of the points in *Chapman v. Hart*^b, determined by Lord Hardwicke, where a testator devised all his lands at or near

^s Vide *Knotsford v. Gardiner*, 2 Atk. 450. ^b 1 Vez. 271.

2 P. Wms. 450.) in *Day v. Trigg*, 1 P. Wms. 286. *Davis v. Gibbs*, 3 P. Wms. 26. *Knotsford v. Gardiner*, 2 Atk. 450. and *Pistol v. Richardson*, reported in the same note; in which last case the authority of *Addis v. Clement*, which relied on the words "all the lands which the testator was seised or possessed of, or any ways interested in," was shaken. Vid. 6 T. R. 345. *Lane v. the Earl of Stanhope*.

Fowey to the plaintiff, and the will was executed in the presence of two witnesses only. The Chancellor observed, that it was not certain whether the testator had any leasehold in or near Fowey. If there should appear to be both, and the law had been with the plaintiff, so that she should be entitled thereto, it would be a ground for the direction of an enquiry; for the answer was not a positive negation of any leasehold. But if, let the fact come out how it would, the law was against the plaintiff, he ought not to direct an enquiry. And he was of opinion, that though it should appear that the testator had leasehold as well as freehold, the plaintiff could not be entitled. And his Lordship supposed a case of a person seised of freehold and copyhold in D. who surrendered to the use of his will, and devised all his lands and tenements in D. to his child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned should be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender: though this were to a child or wife, the court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly exe-

cuted; when, if duly executed, the court would not have supplied that defect: for such variation of the construction would be very dangerous, and might make terms, and perhaps terms attendant of the inheritance, to pass; there was no ground therefore for an enquiry.

PART XI.

Signature and Subscription.

IT shall be my next business to enquire into the state of the law on the essentials held requisite in regard to the signature of the testator, and the subscription of the witnesses. The formalities required are, 1st, that the will be in writing;—2d, that it be signed by the deviser, or some other in his presence, and by his direction;—and 3d, that it be attested and subscribed in his presence, by three or more credible witnesses.

Of the signature of the testator, and the subscription of the witnesses.

If the language made use of by the legislature, were to be understood in its natural and usual sense, it should seem that there could be no great contention in regard to the meaning of the words ‘shall be signed by the deviser,’ which are generally considered

What is a sufficient signing.

as importing the actual and formal subscription of the name of the party at the bottom of the instrument. And by directing this to be done in the presence of three witnesses, the statute at first view seems to require that the attestators should have ocular evidence of the act of signing performed by the testator.

Very soon, however, after the legislature had thought fit to place these guards about a dying man, in this last and important act, courts of justice yielding to the popular bent towards freedom and facility in all alienations of property, instead of strictly executing the intention of parliament, seem to have studied to frustrate its caution.

It has been held a sufficient signing if a will be written by a testator's own hand, with his name inserted.

In the case of *Lemayne v. Stanley* (1), which was determined about four years after the statute was passed, the solemnity of signing was treated with very little regard. Stanley, seised in fee, wrote his will with his own hand, beginning thus, "In the name of God, amen. I, John Stanley, make this my last will and testament," and he thereby devised the lands in question, and put his seal, but did not subscribe his name; but three witnesses

(1) 3 Lev. 1.; and again in the case of *Hilton v. King*, Lord North and Levinz agreed, that it was immaterial, whether the signing be at the top or bottom of the will, for the statute doth not say subscribed, but signed by the testator.

subscribed the will in his presence. And whether this was a good will to pass land within the statute of frauds, was the question. After several arguments, it was adjudged by the whole court, consisting of North Chief Justice, and Wyndham, Levinz, and Charlton, Justices, to be a good will; for being written by himself (2), and his name being in the will, it was a sufficient signing within the statute, which did not appoint *where* the will should be signed, at the top, bottom, or margin, and that therefore a signing in any part was sufficient. And soon after, in the 37th year of the same King, the doctrine was stated still more loosely by Lord Chief Justice Jefferies, who the report ^a says, seemed to hold, that a will written all by a testator's own hand, and acknowledged in the presence of three credible witnesses, would be within the intention of the statute, though it were not signed by him according to the words of the act. And this doctrine has been acteded to as settled whenever it has since come under consideration. So in *Stokes v. Moor*^b, the case of an agreement was said to be like that of wills, upon which it was said to have been determined, that the testator's writing his name in the introduction of the will, was a good

^a Anon. Skin. 227.

^b Dougl. 241.

(2) The Emperors Theodosius and Valentinian allowed every holograph testament to be available, though made without witnesses. Novell. Theod. lib. 2. tit. 4.

signing within the statute. And in the late case of *Coles v. Trecothick* (3), Lord Eldon took notice, that it had been often held in respect to wills, that if a testator begins his will with the formal introduction of "I, A. B. do make this my last will," it was a sufficient signing.

But if the testator begins to sign in regular form, and does not complete it, the statute, as it seems, is not satisfied.

In *Right v. Price*^c there was an appearance of greater strictness. According to which case it appears, that if the testator *shews an intention* to subscribe the will in regular form, by beginning to write his name at the bottom, but being overtaken by weakness or incapacity, before he has completed such intention, he becomes incapable of executing his purpose, the will is not sufficiently signed within the act. In that case, a will had been prepared in five sheets, and a seal affixed to the last, and, likewise, the form of attestation was written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but being unable from the

^c 1 P. Wms. 771, note and vide *supra*, 122.

(3) 9 Vez jun 249.—But his Lordship seemed to think, that for this formal introduction to be a sufficient signing, it should be one simultaneous act, and that, the whole act or intended instrument should be in the contemplation of the testator at the time of his writing such formal introduction. And in this view it may deserve consideration, how far, if a will be written on different pieces of paper, or at different times, such a formal beginning will be equivalent to a regular signing.

weakness of his hand, he said, "he could not do it, but that it was his will." And on the following day, being asked if he would sign his will, he said, "he would," and attempted again to sign the two remaining sheets, but was not able to do it. The case was decided upon another ground, but the Court of King's Bench seemed to be of opinion, that this was not a sufficient signing; for the testator, when he signed the two first sheets, had an intention of signing the others; he did not, therefore, mean the signature to the two first sheets, as the signature of the whole will; and consequently there never was a signature of the whole, but only a beginning to sign.

In *Lemayne v. Stanley*, the writing of the name in the introduction of the will, was all the signing contemplated by the testator, and as far as such a mode could be held a literal accomplishment of the statute, his intention in respect to his will was completed, his mind being in no suspense, nor looking to any further or future act of authentication. But in *Right v. Price*, the testator expressly announced an intention to authorize the instrument in a regular and solemn way, and therefore his will seemed to be inchoate until this was done; why it was not done was to be explained; and so the case could only be established by those parol proofs, which it was the object of the statute to exclude.

In the case of *Lemayne v. Stanley*, above cited, ^{Whether sealing} three of the judges, including the chief, were of ^{is signing.}

opinion, that the testator, by *putting his seal* to the will, had sufficiently signed within the statute, for they said that the signum was no more than a mark, and sealing was a sufficient mark that it was his will.

In *Warneford v. Warneford*^d, which, after a long interval, seems to have been the next case in which this question came to be considered, it is said to have been held by Lord Raymond, on an issue out of chancery of *devisavit vel non*, that *sealing* a will was a *signing* within the statute of frauds. We are to observe, that in *Lemayne v. Stanley*, the opinion of the judges must be regarded as spoken *obiter*, the case being decided on the ground of the sufficiency of the insertion of the name in a will, written by the testator; and the point in *Strange*, as stated only in a short note, was agitated at *nisi prius* only. But this doctrine was but ill received in the subsequent case of *Smith v. Evans*^e, wherein Lord Chief Baron Parker, Baron Clive, and Baron Smith, (in the absence of Baron Legg) are stated to have said, that the opinion of the three judges in *Lemayne v. Stanley* was very strange; for that if it were so, it would be very easy for one person to forge another man's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand.

And the same judges declared, that if the same

^d 2 Strange, 764.

^e 1 Wils. 513.

thing should come into question again, they would not hold that *sealing* a will *only*, was a sufficient signing within the statute. The Chief Baron seems to have been less resolved on the same question, in the opinion delivered by him in *Ellis v. Smith*^f, in which he thus expressed himself: "As to the point, whether sealing be signing; I own I think it is not; for the character and hand-writing are necessary, and were designed to prevent or detect frauds and impositions. But, however, said his Lordship, as in some cases it has been thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion." But Willes C. J. said decidedly in the same case, that he did not think *sealing* was to be considered as *signing*; and he added, that he declared so then, because, if that question ever came before him, he should not think himself precluded from weighing it thoroughly, and decreeing, that it was not signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters; for, upon examination, he had found that many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him (4).

^f Reported in 1 Vez. jun. 11.

(4) See Show. 69. *Lea v. Libb*, where Lord Holt is said to have held sealing to be a signing.

The opinion of Sir John Strange, Master of the Rolls, was on this point agreeable to that declared by the Chief Justice. He observed, that he was not convinced that sealing was signing; for sealing *identified* nothing; it carried no character; and most seals were affixed by the stationers, who prepared the paper. Lord Hardwicke did not, according to the report, speak, in this case, as to the question of sealing; but in a case which had been determined by him two years before^s, his Lordship had expressed himself in stronger language to the same effect with the Lord Chief Justice Willes and Sir J. Strange; he then declared, that the statute, by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then how could it be said, that putting a seal to it, would be a sufficient signing? for any one may put a seal; no particular evidence arises from a seal; common seals are alike; no certainty or guard therefore arises from thence."

Whether making a mark, where the party is unable to write, is a sufficient signing or subscribing.

Till a late case it was a considerable doubt with the profession, whether, if a testator or witness, could not write his name, he might satisfy the statute by making his mark. In *Lemayne v. Stanley*, as it is reported in *Freeman*^b, it is said that the court were of opinion, that it was not necessary for the testator to write his name, for some cannot write, and then their mark is a sufficient signing. But

^s *Grayson v. Atkinson*, 2 Vez. 459.

^b *Freem. Rep.* 538.

this opinion, though entitled to great deference, as being stated to have been that of the court and not of a single judge, yet as being uncalled for by the facts of the case, must be regarded as extra-judicial. Hudson's case¹, which was determined about a year after Lemayne and Stanley, where two witnesses swore that J. S. the testator did not publish the writing as his will, but that A. B. guided his hand, and J. S. made his mark, but said nothing, is too mixed a case to be admitted as an authority to this point.

The observations made by Sir John Strange in the above cited case of *Ellis v. Smith*, on the question as to sealing, do certainly seem as strongly to apply to a testator's mark, for it identifies nothing: it carries no character. But in the late case of *Harrison v. Harrison*², it was decided by Lord Eldon, that the attestation of a devise by a mark, was good within the statute; and as the statute requires the attestators to *subscribe*, and the testator to *sign*, it may be thought that the principle of this determination is applicable *a fortiori* to the signature of the testator himself, since the word 'subscribe' seems much more forcibly to point to the actual hand-writing, than 'sign,' which, without any strain upon its grammatical sense, though, perhaps, not without some sacrifice of its popular and usual acceptation,

¹ Skin. 79.

² 8 Vez. jun. 185.

might be deemed to be satisfied by *any symbol* of the testator's consent and ratification (5).

In the above-mentioned case of *Harrison v. Harrison*, the question was made upon a bill by devisees against the heir, whether the will was duly executed to pass real estate according to the statute of frauds, one only of the witnesses having subscribed his name, the two other having attested by setting their marks respectively. Lord Chancellor Eldon observed, that upon inquiry from Mr. Serjeant Hill, he had found, that there was a special case reserved in the Court of Common Pleas upon the question whether, a will devising real estate was well executed, one of the witnesses being a marksman; and it was held clearly sufficient. It was a case of *Gurney v. Corbet* in 1710, in a note-book, which was the property of Mr. Justice Burnet. His Lordship said, he thought there might have been a great deal of argument upon it originally. But upon this authority the plaintiff must take a decree. In a few months afterwards the same point was determined by Sir William Grant, Master of the Rolls, in *Addy v. Grix*¹,

¹ 8 Vez. jun. 504.

(5) The counsel for the plaintiff is stated to have adverted to the difference of expression in the statute, with reference to the witnesses and the devisor; and to have remarked the difficulty of making the proof, in case of the witnesses being dead.

agreeably to the decision of the Chancellor in *Harrison v. Harrison*, and it therefore seems now to be at rest (6).

It seems to be fairly inferrible from the decision in *Lemayne v. Stanley*, that the court were of opinion, that it was not necessary that the witnesses should attest the very act of signing, but that an acknowledgment by the testator, that the act of signing was done by him, was sufficient for them to attest; for since not the sealing, but the writing over the will with the testator's name in it, was the ground of the decision, the witnesses must have seen this done, if it was judged insufficient for them to attest upon the acknowledgment of the testator; but this was not so found by the jury, or it would have put an end to all controversy upon the case; and if the witnesses did not attest the writing of the whole will by the testator, their attestation could only go to his acknowledgment of his signature. This point, however, seemed to exist in some doubt during a long

It is sufficient if the witnesses attest upon the *acknowledgment* by the testator of his signature, without seeing him *actually sign*.

(6) According to the report of the case of *Lemayne v. Stanley*, in *Freeman*, the court were of opinion, that if the testator had his name on a stamp, it would be enough if he impressed his name instead of writing it. And in *Strange v. Barnard*, 2 Bro. C. C. 585. it was held, that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was not admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number) was called in to subscribe in the place of the testator. C. 6. 23. 1.

time after the statute was passed. In *Dormer v. Thurland*^a, where the will was not signed by the testator in the presence of the witnesses, but he acknowledged it to be his hand, and declared it to be his will in their presence, Lord Chancellor King inclined to think that the will was good, but ordered the point to be reserved, and made a case for further consideration (7).

However, in *Stonehouse v. Evelyn*^a, which came before the Master of the Rolls (Sir J. Jekyll) a few years afterwards, the will was held good, though the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter adds, that on his mentioning this opinion of the Master of the Rolls to Mr. Justice Fortescue Aland, he said it was the common practice, and that he had twice or thrice ruled it so upon evidence on the circuit; and that it was sufficient if one of the three subscribing witnesses swore that the testator acknowledged the signing to be his own hand writing.

Sir Joseph Jekyll had delivered a similar opinion a little before in a case of *Smith v. Codron*, cited by Lord Hardwicke in *Grayson v. Atkinson*^o. In that case A signed and published a will in the presence of

^a 2 P. Wms. 506.

^a 3 P. Wms.

^o 2 Vez. 455.

(7) But the judges of B. R. on argument held the will void, as a charge, for want of being sealed, according to the direction of the power.

two persons who attested it in his presence ; then a third person was called in, and the testator shewing him his name, told him that that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence ; and the testator, two hours after, told him that the paper he had-subscribed was his will. His Honour held this to be a good execution.

But in the instructive case of *Grayson v. Atkinson*, above referred to, this point came fully under the consideration of Lord Hardwicke. The bill was to establish a will against an heir at law, who, by his answer raised the doubt, whether as all the witnesses did not see the testator sign, though *he* saw *them* all sign, this was a good attestation within the statute. The Chancellor, adverting to the argument of the counsel for the defendant, in which they had insisted, that the word '*attested*' superadded to '*subscribed*,' imports that the attestators shall witness the very act of signing, and that the testator's acknowledging that act to have been done by him, and that it is his hand-writing, is not sufficient to enable them to attest, but that it must be an attestation of the thing itself, and not of the acknowledgment, observed, "that certainly there must be an attestation of the thing in some sense, but the question was, whether, if they attest on the acknowledgment of the testator that that was his hand-writing, that was not an attestation of the act, and whether it was not to be construed agreeably to the rules of law and evidence, as all other attestation and signing

might be proved. At the time of making that act of parliament, and ever since, if a bond or deed was executed and signed, and afterwards the witnesses were called in, and before the witnesses, the person making it, acknowledged the signature to be his hand-writing, that was always considered as an evidence of signing by the person executing, and was an attestation of it by them.

“It is true,” said his Lordship, “there is some difference between the case of a *deed* and a *will* in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging the sealing, without witnesses, has been sufficient (8). But nevertheless, that is the rule of evidence in respect to signing. If it were in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument be attested by witnesses, proving that they were called in, and that the party took up the instrument, and said, that was his hand, such would be a sufficient attestation of the signing by him. That is the rule of evidence. Considering, therefore, the words of the act of parliament, it seems, that if the testator having signed the will, did, before the attestators, declare and acknowledge he had so done, and that the signature was his hand, that might be sufficient to make the attestation good.”

(8) But see *Grellier v. Neale and others*, Peake, Ni. Pr. Ca. 146. See also *Parke v. Mears*, 2 Bos. et Pull, 217

The case of *Ellis v. Smith*^p, came on in 1754, which was about two years after *Grayson v. Atkinson*, and here the Lord Chancellor Hardwicke was assisted by Sir John Strange, Master of the Rolls, Willes Chief Justice of B. R. and Parker Chief Baron. The form in which the question is reported to have been put, was, whether a testator's declaration before three witnesses, that it was his will, was equivalent to signing it before them, and constituted a good will within the 5th section. The determination of *Grayson v. Atkinson* by Lord Hardwicke, was in this case mentioned by the Master of the Rolls, as an authority full to the point upon the first question; and his Honour said, that to determine otherwise at that time, would introduce confusion and uncertainty, and sap the foundation of much property which rested on former decrees.

The court was unanimous, in holding such acknowledgment by a testator to the attestators of his will, to be good within the statute; and the Chief Justice declared, that his opinion was virtually supported by those cases which had decided the attestation and subscription of the witnesses *at different times* to be good, for then, a testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two; and why should not his acknowledgment to the three be equally good? The Chancellor also observed

^p 1 Vez. jun. 11.

that those cases supported the one before him from their *direct similitude*, and not from any consequential reasoning ; for he apprehended, that the determination in all those cases was grounded on this, that a declaration by the testator was good ; for if he signed three times, there were three executions, and none could be good within the statute (9).

The late case of *Addy v. Grix*¹, shews it to be the present sense of the courts, that this point is settled. The bill was filed to carry into execution a devise of real estate in trust to be sold. One of the witnesses, by his depositions, stated, that he did not see the testator execute, but that the testator took the will in his hand, and said the will, and also his name, were of his hand-writing. The Master of the Rolls, without difficulty, admitted the sufficiency of the attestation.

¹ 8 Vez. jun. 504.

(9) The reporter has added a note, wherein he questions the propriety of this dictum of Lord Hardwicke, which had first fallen from the Lord Chief Justice ; observing that it was hard to say that such declaration or acknowledgment would be sufficient in any case where *actual signing* would not do. But it is to be observed, that the acknowledgment or declaration is not supposed to stand in the place of, or be equivalent to a distinct act of signing, but to give effect to the attestation of the act of signing already done.

PART XII.

Formality of Publication.

THE acknowledgment of the signing to the three subscribing witnesses, seems, according to the principles on which many cases have been decided, to comprize the efficacy of what the law means to express by the *publication* of the will; the manner of effectuating which, was often a judicial question before the statute of frauds. The term itself, *publication*, seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form. After the statute of wills had established the direct testamentary power, accompanied with the obligation of declaring the will by writing, these parliamentary wills were thought to require a very slight degree of formal publication, superadded to the solemnity and durability of writing; and the cases shew, that, before the statute of frauds, very little, if any, verbal formality was thought necessary to accompany the written declaration.

Thus, a very few years before the statute of Charles was enacted, it was resolved, in the King's Bench, by the whole court, on a trial at bar, in an issue out of Chancery, 1st, that if a man draws up his own

will, and sends it to counsel to be advised of the legality of it, this is no will, unless it had a publication after he received it back from his counsel: but 2d, that if after the will came from the counsel with alterations made by him, the party put his seal to it, or *subscribed* his name, or wrote upon it, 'this is my will,' though there were no witnesses to it, yet this was a good publication, because by any of those expressions, the testator declared his intent that it should be his will^a. In *Peate v. Ougley*^b, Sir John Hollis mentioned a case determined by Lord Shaftesbury, before the 29 Car. 2. in which, though the testator wrote his will with his own hand, and also these words '*signed, sealed, and published in the presence of,*' and no witnesses had subscribed it, it was held a sufficient publication. And in the principal case, because these words, *signed, sealed, and published in the presence of,* were written at the top of the will for want of room below, in the testator's own hand, and then the names of the three witnesses were subscribed, though one witness (the other two witnesses being dead) deposed, that himself and the other two witnesses were called up in the night, and sent for to the testator's bed-chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but *without seeing any of the writing,*

^a *Bartlett v. Ransden, et al.* Trin. 15. Car. 2. B. R. Vin. Abr. tit. Dev. (N.2.) pl. 16.

^b Vin. Abr. tit. Dev. (N. 7.) . 12.

or being told by the testator it was his will, or what it was, but that he believed it to be the same paper, because his name was there, and the names of the other witnesses, and he never witnessed any other paper for the testator; this was held to be a sufficient publication of the will, after the statute of 29 Car. 2. But it should be remembered, that Lord Hardwicke, in the case of *Ross v. Ewer**, mentioned a case of a Mr. Windham in the court K. B. which was a trial at bar, upon the will of his uncle; wherein the only question was, whether the testator *published* it; there was no doubt of his having executed it in the presence of three witnesses, or of their having attested it in his presence; which shewed, his Lordship said, that *publication* is, in the eye of the law, an *essential* part of the execution of a will, and not a mere matter of form.

The point therefore seems subject to some doubt, whether *publication* is to be considered as a mere vague term, expressing generally the act of authenticating and announcing the veritable will of a testator, but depending as to the mode by which it is to be effectuated, on the particular ceremonies and solemnities prescribed by the legislature, or imposes a specific obligation upon the testator *beyond* the execution and attestation of the will according to the statute of frauds. If any positive declaration by the testator, that it is his will, be necessary to consti-

* 3 Atk. 161.

tute a sufficient publication since the statute, it does not seem that the mere acknowledgment of the signing can operate as an equivalent; for the *acknowledgment* of the signing, unless the testator at the same time acknowledge his will, cannot be more extensive in effect than the *act* of signing in the presence of the witnesses. Upon the whole, however, we are to consider that, great as is the weight of Lord Hardwicke's opinion, it was delivered on this point in *Ross v. Ewer*, gratuitously and extrajudicially; whereas the cases of *Peate v. Qugley*, *Trimmer v. Jackson*, *Stonehouse v. Evelyn*, and others, which have been cited for the contrary doctrine, are direct authorities.

PART XIII.

Wills interrupted and resumed.

A will, though it be proceeded in at *different times*, and often suspended and resumed, will need only one execution.

IT is established by the agreement of all the cases, that a testator may make his will at different times, if the subsequent writing takes up and continues the former; and it matters not by how long intervals these acts are separated; they will compose one entire instrument, if the first purpose appears to have proceeded to its accomplish-

ment, though with many pauses and resumptions. Thus^a, where an illiterate person made and signed his will, in which there was a devise of lands, and at a subsequent period added more to it *on the same sheet of paper*, and declared that he did not thereby mean to disannul any part of his former devise and disposition, and signed it, and then took the sheet of paper in his hand, and declared it to be his last will and testament in the presence of three witnesses, and desired the witnesses to attest it, which they did in his presence, this was held to be one entire will, though made at different times, and to be attested agreeably to the statute of frauds; or, in other words, the additional writing was held to be part of *one entire will*, and not a *codicil*, and the execution and attestation to be an *original* publication, and not a *re-publication*.

But where the will was written on different pieces of paper, it was holden, that the witnesses ought to see *all* the pieces of paper, or the will was not properly attested. Thus, in ejectment^b, where the special verdict set forth, that J. D. made his will in 1670, with two witnesses who subscribed their names in his presence; and in 1679, made a codicil, and thereby confirmed his will in what was not altered, and inserted some new bequests, and there were two witnesses to it, one of whom had witnessed

Of the execution of a will written on different pieces of paper.

^a Carleton v. Griffin, 1 Burr. 549. Carth. 37. arguendo, and, as it seems, agreed to by Dolben, J.

^b 2 Mod. 263.

the will, and the other was a new one, the only point was, whether these made together three witnesses to the will, to satisfy the statute of frauds; but the court decided against the devise, because the third witness was not a witness to the first will. There was no entire instrument attested by three witnesses (1). And if the additional writing be not

(1) The reader should compare this case of *Lea v. Libb*, with *Bond v. Seawell*, 3 Burr. 1773. Blackst. 407. 422. 454. in which latter case it was proved, that C. made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page; and that he also made a codicil of his own hand-writing upon one single sheet, and then called in H. and shewed him both the sheets of his will, and his signature to every page thereof, and told him that *that* was his will, and then he shewed H. the codicil, and desired him to attest both the will and codicil; which he did in the presence of the testator, and then went out of the room. V. and L. came in immediately afterwards, and the testator shewed them the codicil, and *the last sheet of his will*, and sealed both before them. C. then took each of them up severally, as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but *never saw the first sheet of the will; nor was that sheet produced to them; nor was the same nor any other paper upon the table; both the sheets of the will were found with the codicil in the testator's bureau, after his death; all wrapped up in one piece of paper; but the two sheets of the will were not pinned together; and the question upon these facts was, whether this will was duly executed according to the statute of frauds?*

After three several arguments before the court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His Lordship said, that the question made at the trial, and submitted by the case, as it stood, turned upon the solemnity of the execution, and they were of opi-

a resumption and continuation of the former, but a distinct act and disposition by way of codicil, it may operate as a republication of the will as to lands, if both the will and codicil are attested, respectively, according to the statute; but if the will was not so executed and attested, the codicil will not help the defect, although it have the requisites of the

nion, that the due execution of this will could not be come at, in the method wherein the matter was then put; that if this were considered as a special verdict, they thought *it was defectively found as to the point of the legal execution of the will*. But that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstances sufficient to *presume*, that the first sheet was in the room; and that the jury ought to have been so directed; but upon a special verdict, nothing could be presumed; therefore, they were all of opinion, that it ought to be tried over again; and if the jury should be of opinion, *that it was then in the room*, they ought to find for the will generally, and they ought to presume from the circumstances proved that *it was then in the room*.

It is to be observed, that *Lea v. Libb* was on a special verdict, and, therefore, no facts could be presumed; but it does not seem that the case afforded the same ground for presumption, as that of *Bond v. Seawell*, in which last case there were *three witnesses*, if any, to the *whole* will, for the question was not as to the complement of witnesses, but whether the *whole* will, (the first sheet not having been seen by them,) was covered by the attestation; whereas, in *Lea v. Libb*, it was necessary to make the will and codicil *one* instrument, before the attestation could be held sufficient, for to neither, and to no part of either, were there three witnesses; and if they were *distinct* instruments, it seems, according to the authorities, that each ought to have been attested by three witnesses, to have been valid within the statute.

statute, for what was bad in its *creation*, cannot be made good by any thing *ex post facto*, and the operation of a codicil, where it is a republication, is only to set up the will in its *original state and efficacy*, making it, *as far as it is efficient in itself by the solemnities of its execution and legal compass of expression*, reach to the date of the codicil, and embrace intermediate acquisitions (2).

Thus, a testator^c, devised his lands to trustees and their heirs, in trust for maintaining and providing for the poor scholars of a college in Cambridge, and for other charities, and the will was written with his own hand, but had no witnesses, and afterwards he made a codicil, which was duly executed and subscribed by four witnesses, wherein he recited and took notice of the will. And one of the questions in the case was, whether the codicil was a good publication of the will within the statute of frauds? It was contended on behalf of the devisees, that the codicil, taking notice of the will, and being duly executed, made the will valid in the same manner as if it had been affixed to the will at the execution thereof, for the law would construe it as part of the will, and its being laid in a different place signified nothing. But it was held, that the will was void, for

* Attorney General v. Barnes, 2 Vern. 597. Prec. in Ch. 270.

(2) Vid. Heylin v. Heylin, Cowp. 130.

though there were three subscribing witnesses to the *codicil*, yet that would not support the *will*.

This difference between the relation which a *codicil* bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act, is not difficult to understand as a proposition, though very difficult to explain by example, or apply in practice. Upon this distinction, however, will, it seems, depend the question, whether or not, the *first* act of testamentary disposition will require to be executed and attested according to the statute.

Of the difference between a writing in continuation of a will formerly begun, and a republication.

But whether the *subsequent* writing be considered as a republication by way of *codicil*, or as the conclusion of something already begun, as in the case just mentioned of *Carleton v. Griffin*, it appears quite clear, upon the principles of *Haberg-ham v. Vincent*, already discussed, and the doctrines of other cases, that such *subsequent* writing to be effectual to pass land, must be executed and attested as the statute directs, in the case of devises of lands.

It was early decided that a will of lands was good where the three witnesses subscribed their names, at several times, without being present at once together^d. And though the witnesses must subscribe the

That the subscription of the witnesses need not take notice that they attested in the testator's presence.

^d *Freem.* 486. *Anon.* 2 *Cha. Ca.* 109. *Anon.*

will in the presence of the testator, it is not necessary that in such subscription *notice* should be taken of the *fact of its having been done in the presence of the testator*, for this is not in terms required by the statute; and whether it be so expressed or not, it must be proved to have been so done, to the jury. An authority on this subject is the case of *Hands v. James*^c, where the question on a case reserved on the trial of an ejectment brought by the heir, for the opinion of the court, was, whether it should be left to a jury to determine, whether the witnesses to a will (*being all dead*) did or did not set their names *in the presence of the testator*, and this merely upon circumstances, without any positive proof; and the court thought that it was a matter fit to be left to a jury: for they said, the witnesses, by the statute of frauds, ought to set their names in the presence of the testator, but it was not required by the statute, that this should be taken notice of in the subscription to the will; and whether *inserted* or not, it must be proved; and if inserted, it does not conclude, but may be proved *contra*, and the verdict may find *contra*. Then if not conclusive *when inserted*, the *omission* would not conclude on the *negative* side, and therefore, *it must* be proved by the best proof the nature of the thing was capable of. And they further said, that in case the witnesses were all dead, there could not be any *express* proof, since at the execution of wills, often-

^c Com. Rep. 531. et seq.

times none are present but the devisor and witnesses. The proof must, therefore, as in other cases, be circumstantial; and there were sufficient circumstances in the case, 1st, three witnesses had set their names, and it must be intended they did it regularly; 2dly, one witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary. And the question being a matter of fact, it ought to be left to the jury, like the question whether livery was given in a feoffment, where no livery was indorsed; and whether a deed was executed, where the counterpart only was produced.

To the same effect was the case of *Croft v. Paulet*^f, where the words of the attestation were "signed, sealed, published, and declared, as and for his last will, in the presence of us, A. B. and C." And it being objected, that the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one; the court, on the authority of the case of *Hands v. James*, above cited, said it was evidence to be left to a jury, with all the circumstances; and a verdict was given for the will.

The same point was decided in the same way a few years before, by Lord Chief Justice Willes, and the rest of the Court of Common Pleas, in the case

^f 2 Strange, 1109.

of *Brice v. Smith* (3), where also the witnesses were all dead.

PART XIV.

Qualification of Witnesses.

IN Hudson's case, reported in *Skinner*³, it was proved that the witnesses had been dealt with; upon which it was urged by the counsel, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute; to which Chief Justice Pemberton answered, that if there were three witnesses to a will, whereof one was a thief, or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct the jury to find it a good will. By which it

• 79.

(3) *Willes's Rep.* 1. *Com. Rep.* 539. S. C. But the report in *Comyns* seems to be a little inaccurate, in saying, that nothing but the names of the witnesses were subscribed; the attestation being expressed in the same words as in the above-mentioned case of *Croft v. Paulet*, "signed, sealed, published and declared, by the said testator, to be his last will and testament, in the presence of us, &c." See the note of the editor. *Willes* 4. (b)

should seem, we ought to understand his Lordship to mean, that if there was nothing at the time of the attestation to impeach the competency of the witnesses, they must be regarded as credible witnesses at that time, within the proper interpretation of the word *credible*, as used by the statute. But if a witness be *convicted* of felony, and so rendered infamous, at the time of his subscribing the will, it seems not to have been doubted, but that the will was invalid, for defect of a sufficient attestation.

Crimes which stigmatize a man with infamy, when convicted thereof, such as treason, felony, conspiracy at the suit of the crown, perjury, forgery, barratry, attain of false verdict, and which disqualify him for giving evidence upon a trial in a court of justice, disqualify him also for becoming a subscribing witness to a will^b. It seems, indeed, to have been formerly a notion, that every offence for which a man had been caused or even sentenced to be set in the pillory, on account of the infamy of the punishment, rendered him incapable of giving testimony^c; but more modern cases have established, that the infamy of the *crime* only, and not the infamy of the *punishment*, is the ground of disqualification; and according to the present doctrine, persons who have suffered an infamous punishment, unless the offence for which it was inflicted on them, was of the species of *crimen falsi*, or other crime of an infamous na-

What offences disqualify.

It is the infamy of the offence, and not of the punishment, which disqualifies.

^b Com. Dig. tit. Temoigne. A. 2.

^c Co. Litt. 6. b.

ture, are not disabled from giving their testimony in a court of justice, however much their credit with the jury may be affected by such a fact. Before the statute of the thirty-first of this King^d, persons convicted of petit larceny, were judged not to be credible witnesses to attest a will under the statute of frauds. And in the case wherein this was held, the rule was also laid down in strong and clear terms, that it is the crime and not the punishment which makes a man infamous, and vitiates his testimony^e.

If a man be sentenced to the pillory for a treasonable libel, or slanderous words on government, he is not rendered incapable of becoming a witness in court, and is therefore a credible witness to a will; but if he be convicted of barratry, which is an *infamous offence*, though he be sentenced only to be *fined*, he is rendered incompetent as a witness in court, and unqualified, it is conceived, as a *credible* witness, to attest under the statute^f. Idiots and madmen, and children under the age of common knowledge, who are incapable of discerning or estimating truth, are clearly in a state of legal incompetency to prove a fact, and therefore, can never be regarded as capable of attesting a will, so as to answer what the statute in-

^d By stat. 31 Geo. 3. c. 35, Willes, 665. 2 Wils. 182. And it is enacted, that no person see Rex v. Ford, 2 Salk. 690. shall be an incompetent witness, 5 Mod. 15.

by reason of a conviction of petit ^f Chater v. Hawkins. 3 Lev. larceny. 426. Rex v. Ford, 2 Salk.

^e Pendoek v. Mackinder, 690.

tends by such attestation. And generally, I apprehend, it may safely be concluded, that whatever incapacitates a man as a witness at common law, is an objection to the sufficiency of his attestation as a credible witness, within the meaning of the statute; for '*credible*,' in the place in which it stands in this statute, cannot well be received in any other sense than '*competent*;' the word in its popular sense being incapable of any constant test or standard, according to which a testator could make his choice of witnesses with any confidence in the validity of their attestation.

The word '*credible*' as it is used by the statute must be understood in the sense of competent.

Upon the same principle, if the competency, after being lost, has been restored before the attestation, the credit required by the statute has also been re-established, and the attestation will be good. Thus the King's pardon, after a conviction of perjury, or other offence at common law, qualifies the party to attest a will, though, as it should seem, it would be otherwise in the case of a conviction of perjury, on the statute of 5 El. c. 9(1). And such restoration to competency would come too late, as I appre-

(1) If a man be convicted of perjury upon the statute, he cannot be restored to credit by the King's pardon; for by the statute, it is part of the judgment, that the convict be infamous, and lose the credit of his testimony; nothing therefore but a reversal of the judgment, or a statute pardon will, in that case, suffice to restore the competency. *Rex v. Crosby*, 2 Salk. 689, and *Rex v. Ford*, *ibid.* 690. 3 Salk. 155.

hend, between the time of attestation and examination in court (2).

Of the qualification of the attesting witnesses in the civil law.

(2) By the laws of the empire, those persons only were capable of attesting a will, who were themselves legally capable of making a will. No persons under puberty, or insane, or mute, or deaf, or prodigal interdicted the use of his own property, or such as the law had judged reprobate or infamous, or had rendered intestable, could be admitted as witnesses to a will. I. 2. 10. 6. D. 28. 1. 20. Neither could women be witnesses to regular or perfect wills: the law admitting them in all matters, whether civil or criminal, when the nature of the case was such, that other evidence could not be attained, but not when there was a choice of testimony, as in making wills, and solemnizing other public acts. Their testimony was admitted in proof of a fact, but not to give validity to a solemn instrument. See this particularity of the civil law explained, and the whole of this title of the Institutes '*qui testes esse possunt*' well commented upon by Vinnius, edit. Hein. 297.

The witnesses by the civil law must be credible, and idoneous, *at the time* of the will's being made, and according to the humanity of that system, as well as of our own, every one was presumed to be fit as a witness, unless the contrary was made to appear. D. 22. 5. 2. It is to be observed too, that *all* the witnesses ought to be fit, or *idoneous*, for the whole will was rendered null and void by the insufficiency of *any one* of the witnesses. C. 6. 23. 12. unless a codicillary clause were added, that if it were not valid as a will, it should be valid as a codicil.

If a madman attested in a lucid interval, his attestation was good, and so was that of a prodigal, if, before attesting, he had returned *ad bonos mores*. The integrity and freedom of the witnesses was a great point in the imperial law; in so much, that no person could be a witness to a testament, who was under the power of the testator; and though any number of persons might be admitted witnesses out of the same family, to a will in which the family was not interested, yet if a son of a family gave away his military estate, or *peculium*,

By the law of Rome no *hæres scriptus* or appointed heir could be admitted a witness to the testament by which he was so appointed, nor could the testimony of any one who was in subjection to such heir, or of his father, to whom he himself was in subjection, or of his brothers, if they were under the power of the same father, be admitted; but the testimony of legataries, and of those who were allied to them, or in subjection to them, was admissible^s; which was a doctrine, not perfectly agreeable to the *general rule* of the civil law, that no one should be permitted to give testimony in his own cause^h. Nor is the consistency of that rule saved by the reason given for the admission of such testimony, viz. that legataries were particular and not universal successors, and that a testament might be valid without them; whereas the appointment of an heir, was of the essence and constitution of a perfect testa-

^s I. 2. 10. 10. 11.

^h Cod. 4. 20. 10.

after leaving the army, neither the father, nor any one under the power of the father, could be a witness to the testament. In excuse for which rules of exclusion, the extent of the paternal authority among the Romans should be remembered; and, indeed, so adjusted to one another do the several parts of the system of the Roman jurisprudence appear to be, that the student will have considered them with little advantage in a view to the illustration of such of our own laws as have been copied from them, or are in affinity with them, unless he has found time and possessed curiosity to make that great work of human policy a distinct and specific branch of his studies.

ment (3), and formed the principal feature of distinction between that and a codicil (4), or a *donatio causa mortis*.

Of the rule of the spiritual and common law courts, where the witness was a legatee or devisee.

In the spiritual courts of this kingdom, to which the sole cognizance of the validity of wills belongs, where they relate to personal estate, no legatee, can give his testimony in *foro contradictorio*, in support of the validity of the will, till he has released

(3) The exactest definition of a Roman testament has been thought to be this—the appointment of an executor or testamentary heir, made according to the formalities prescribed by law. Domat. lib. 1. t. 1. sect. 1. and see D. 28. 5. 1.

(4) There is no difference in our law, as to publication, between codicils and wills; but codicils are said by Justinian, *nullam solemnitatem ordinationis desiderare*: which Vinnius comments upon with disapprobation, as not being consonant to the Theodosian code; and complains of the *jejuna quorundam distinctio inter solemnitatem ordinationis et probationis*. Heineccius, however, maintains the distinction thus: *In testamentis condendis testibus opus erat talibus quibuscum olim fuerat testamenti factio in comitiis calatis, quia jure vetustissimo lex erat populi suffragiis perlata, jure novo sollemnis nunciatio hereditatis. Omnia ergo hic sollemnia. At codicilli erant epistola. Quis epistolis testes adhibet? quis in iis sollemnitatem requirit? valebat hujusmodi epistola, etiam non obsignata, dum de ejus fide constaret: quia enixa voluntatis preces ad omnem successionis speciem porrecte videbantur. Testes ergo adhibebantur ab iis, qui nuncupative fidei committebant. Postea autem in scriptis codicillis intestatorum testium opus erat presentia per L. 1. C. Theod. de test. et codicill. non sollemnitatis causa, sed ut testantium successiones sine aliqua captione serventur. Ergo non sollemnitatis causa adhibendi, sed probationis causa. Nec aliud voluit Theodosius dum in omnibus codicillis testes requisivit. Vin. Com. lib. 2. tit. 25.*

his legacy or received the value thereof, and in case of payment, the executor of the supposed will must release all title to any future claim upon such legatee, who might otherwise be obliged to refund if the will be set aside; and the release is always made to the intent, that the legatee may have no shadow of interest at the time of making his deposition¹. The same rule prevailed in our courts of common law with respect to the inadmissibility of the testimony of a devisee or person benefited under a will of real estate, to establish its validity; and it appears from the case of *Anstey v. Dowsing*², that, if a legatee, who was a witness to a will, refused either to renounce or to receive a sum of money in lieu of his legacy, he could not be compelled by law to divest himself of his interest, and while his interest continued, his testimony was useless.

J. T. made his will, by which he disposed of his real estate, and gave to one J. H. and his wife, 10*l.* each for mourning, with an annuity of 20*l.* to E. H. the wife of J. H. The will was attested as the statute directs, by three witnesses, whereof J. H. was one. The legacies, and satisfaction for the annuity were tendered and refused. And the question upon the special verdict was, whether, or not, the will was well attested according to the statute of frauds. The judges of the King's Bench were unanimously of opinion, that a right to devise lands depended

¹ Vid. Harris, Inst. Just. ² Ibid.
lib. 2. tit. 10. §. 11.

upon the powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the devisor: that these were checks to prevent men from being imposed upon: and certainly meant that the witnesses to a will, (who are required to be *credible*) should not be persons entitled to any benefit under that will. And that, therefore, J. H. was not a good witness¹.

It seems also, that the question was started in this case, whether a benefit to a witness at the time of his attestation, should annul his testimony, though, at, or after the testator's death, he should become disinterested by a release of his legacy, or the receipt of the value thereof, and that it was held, that the condition of the witness, *at the time of his attestation*, must be regarded; and that if interested *then*, he could not be a good witness. The doubts and objections agitated in this and in other cases^m, occasioned the statute 25 G. 2. c. 16ⁿ. to be passed, whereby the contests concerning the force and obligation of the word '*credible*' in respect to the attestation of persons benefited under the will, were finally composed.

The inquisitive student, however, will still recur

¹ Strange 1254.

Gwyllim, 329. Price v. Lloyd,

^m Hilliard v. Jennings, Com. 1 Vez. 503. 2 Vez. 374.

Rep. 91. and 7 Bac. Abr. edit.

ⁿ See Appendix.

to the perusal of Lord Mansfield's^o and Lord Camden's arguments^p on the opposite sides of the question, concerning the import and exigency of the words 'credible witnesses,' used by the statute. He will find Lord Mansfield strenuously of opinion, that though a witness might be entitled to a benefit under a will at the time of the attestation, yet if he became disinterested *before his examination*, his testimony was restored, and the will was supported by his attestation. In his Lordship's judgment, the word 'credible' could have no meaning beyond 'competent,' without leading to great absurdities; and in this *general* exposition of the word, Lord Camden coincided, but their difference was this: Lord Mansfield would understand 'competency' to imply nothing more than what was *tacitly contained in the word witness by itself*, (no man being a witness unless he is competent to give his testimony); so that it appeared to his Lordship (5), that the competency was to be seen and adjudged of *at the time, and with reference to the time of examination in court*. Whereas according to Lord Camden the *credibility*,

Of the opposition in sentiment between Lords Mansfield and Camden, on the import and exigency of the word 'credible' in the statute.

^o Wyndham v. Chetwynd, 1 Burr. 414.

^p Hindon v. Kersey, 4 Burn. Eccl. L. 97.

(5) In the subsequent case of Hindon v. Kersey, it is stated, that Lord Mansfield, previous to his delivering his opinion in Wyndham v. Chetwynd, declared that *it was his own*, and that he was personally answerable for all its errors; the judgment of the court being *general*, that they held the will duly executed according to the statute.

i. e. competency, must be regarded as it stood at the time of the attestation. By Lord Mansfield's explanation of the force of the word *credible*, it became a dead letter, and, therefore, his Lordship reduced himself to the necessity of supporting his argument, by supposing the word '*credible*,' to have slipped in through the inadvertency of the framers of the statute, which he denied to be the production of Lord Hale, any further than, perhaps, as being compiled from some of his loose notes unskilfully digested,

His Lordship adverted to the rule of testimony in the Ecclesiastical Courts, and at the common law, where a release payment or tender made the testimony of the witness good. Nice objections of a remote interest, which could not be paid or released, though they hold in other cases, were not enough to disqualify a witness in the case of a will. Thus, parishioners, he said, might prove a devise to the poor of the parish for ever. Interest was no positive disability; it only afforded a *presumption of bias*, and on that ground rendered a witness incompetent; but still, it was *only presumption*, and presumptions only stood till the contrary was made apparent; if the bias were removed, the presumption ceased. That nothing could be more reasonable than to allow this objection of interest to be purged *by matter subsequent to the attestation*, and previous to the trial.

Lord Camden, on the other hand, in the case of *Hindon v. Kersey*, argued, that the word '*credible*' imported a *necessary* and *substantial* qualification of a witness *at the time of his attestation*. And that if the witness was incompetent *at that time*, nothing *ex post facto* could restore the validity of his attestation; neither could such devisee, or person taking a benefit under the will, be received as a witness for other devisees under the same will: the objection was irremovable, and the *whole* instrument, as far as it concerned real property, was void. He was of opinion, that the novelty introduced by the statute was the *attestation*, the method of *proving* which was left standing upon the old common law principles; as that one witness might prove what all the three had attested; and, though that witness must be a subscriber, yet that was owing to the general common law rule, that the best evidence must be produced. He considered, therefore, that the statute had principally in view the *quality* of the witnesses *at the time of the attestation* (6). That a will was the only instrument which required to be attested by subscribing witnesses at the time of execution; while leases, marriage agreements, decla-

(6) In *Brograve v. Winder*, 2 Vez. jun. 636, an objection was taken to the competence of one of the witnesses to the will, as being interested *at the time of his examination*; but as he had no interest *at the time of the execution of the will and death of the testator*, the Lord Chancellor, without argument, held him to be a good witness.

rations, and assignments of trusts, were only required to be in writing and signed. Those were all *transactions of health*, and protected by valuable considerations, and antecedent treaties. The power of a court of equity was thought sufficient to meet every fraud that could be practised in those cases; but a will was often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such case was this,—was the testator in his senses when he made the will? and consequently the time of the execution was the critical minute which required guard and protection. An act so solemn, and often calling for a laborious recollection and investigation, executed at such a time, was pregnant with suspicion. What then, his Lordship said, was the employment of the witnesses? It was to inspect and judge of the testator's sanity before they attested, and if he was not capable they ought to refuse to attest. In other cases, the witnesses were *passive*; here they were *active*, and in truth the principal parties to the transaction. THE TESTATOR WAS INTRUSTED TO THEIR CARE. The design of the statute was to prevent wills from being made, which ought not to have been made, and *always operates silently by intestacy*. It is true, continued the Chief Justice, the design of the statute was to prevent fraud; and though no suspicion of fraud appeared in the case before him, yet

¹ Vid. Doc. on dem. *Walker v. Stephenson*, 3 Esp. Ni. P. Ca. 284.

the statute had prescribed a certain method, which every one ought to pursue to prevent fraud'. As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to leave the rule inflexible, than to permit it to be bent by the discretion of the judge.

The reader will perceive, that both the cases of *Wyndham v. Chetwynd*, and *Hindon v. Kersey*, came before the respective courts, after the statute 25 Geo. 2. viz. the former in *Michaelmas* term 31 G. 2., the latter in *Easter* term 5 Geo. 3.; but the wills in both the cases were made before the last-mentioned statute was to have its operation of making void the beneficial interest given by the will to the person becoming a subscribing witness thereto, and therefore those cases could only come under the third section of that statute (if at all) which provided for the case of wills made before the 24th of June, 1752, and this clause makes mention only of a legacy or bequest, and extends only in words to the immediate object of such legacy or bequest.

Neither the case, therefore, of *Wyndham v. Chetwynd*, (being that of a creditor of the testator becoming a subscribing witness to his will, which charged his debts upon his real estate;) nor that of *Hindon v.*

* Vid. *Lea v. Libb*, Carth. 37. the words of the court,

Kersey, (in which there was a devise of the testator's lands to trustees to dispose of the rents to the poor of a township, and the subscribing witnesses were seised of property in the township assessed to the poor rate,) were within the third section; and, consequently, they were not either of them within the statute. The circumstances of which cases would, however, were they *now* to happen, clearly bring them respectively within the first and second sections of the above-mentioned statute of George the Second. This great question is, therefore, now at rest to all practical purposes, and remains only a subject of curiosity on which, as such, a great incidental importance is reflected, by the exercise they have given to two of the finest intellects which have adorned the bench of justice, in the maintenance of a most solemn and diametrical opposition of argument.

We cannot but observe, however, that, although Lord Mansfield was supported by all his brothers, and Lord Camden was over-ruled by those who sat with him, the legislature showed their sense of the subject to agree with the policy and principles of Lord Camden's reasoning, by extinguishing the interest of the subscribing witness, whatever it might be *at the moment of his attestation*. By this provision of the legislature by their second act, they seem to have declared their intention by the first; and still, in their alteration of the law, regarding the

time of the attestation as the particular juncture to which the qualification related, they have made the interest of the individual a sacrifice to the will.

PART XV.

Time and Manner of making the Attestation.

UPON a feigned issue, tried in the Court of Common Pleas, the question was, whether the will was made according to the statute of frauds? for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. The Court said, the statute required attesting in his presence, to prevent obtruding another will in the place of the true one. It is enough if the testator *might* see, it is not necessary that he *should actually see them* signing; for, at that rate, if a man should turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he *might* have seen it, and that is enough. And they compared it to the case, where the testator lay sick in bed, with the curtain drawn^a; while the witnesses subscribed.

That it is enough if the testator *might* see the witnesses whether he *did* actually see them or not.

^a Shires v. Glascock, 2 Salk. 688.

On a trial at bar, where the question was, whether the witnesses to a will had pursued the directions of the statute of frauds, in the manner of subscribing their names, it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he *might* see them subscribe their names if he would, though there was no positive proof that he *did* see them subscribe their names, there was a sufficient subscribing within the meaning of the statute; because, *it was possible* that the testator *might* see them subscribe; and the court held, that if the witnesses subscribed their names in the same room where the testator lay, though the curtains of the bed were drawn close, it was a good subscribing within this statute^b (1)

^b Davy and Nicholas v. Smith, 3 Salk. 395.

(1) The notion of the civil lawyers was more rigid and cautious in this respect. The attestation ought to be in *conspectu testatoris*; and further, *non est satis, ut quidam tradiderunt, testes oculatos esse, si testatorem ipsi non videant, forte velo, aut cortina interjecta conspectum adimente, licet vocem ejus audiant: sed necesse est ut faciem ejus videant, ne qua fraus fiat, alio forte subornato, qui vocem testatoris imitando simulet.* *Vinn. Com. 1. lib. 2. tit. 10.* And Vin-
 nius was of opinion, that a *blind man* (*de quo nihil traditum est*) could not be a witness because he could not satisfy the law, which required that the testator should be seen by the witnesses, and that

A similar doctrine was maintained by Lord Thurlow in the court of Chancery, in a case circumstanced as follows^c: Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution they returned into the office to attest it; and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witness took the will to her, which she folded up and put into her pocket. The Lord Chancellor inclined very strongly to think the will well executed, and the above-mentioned case of Shires and Glascock, 2 Salk. 688. was relied upon as an authority. Mr. Arden pressed for an issue, but finding the Lord Chancellor's opinion very decisive against him, he declined it.

^c *Casson v. Dade*, 1 Bro. C. C. 99.

they should be able to recognize the testator's signature. [The English law, however, is clearly otherwise in this respect, as an acknowledgment of the signing has been held sufficient, as appears above; and it has been held, that it is not necessary to the execution by a blind man that it should be read over to him in the presence of the subscribing witnesses. *Longchamp v. Goodfellow*. 2 N. R. 415.

In *Broderick v. Broderick*^d, where the testator devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, who went down stairs into another room, and attested the will there; which was *out of the presence of the testator*, the relief afforded to the heir against a release obtained from him by the devisee, under a false assurance that the will was sufficiently executed, was a necessary consequence of the opinion of the Chancellor^e, that the devise, was void for want of an execution conformable to the statute. And it was in vain contended for the devisee, that the will, as to the devisor, was *executed*, and that the form of the witnesses subscribing in the presence of the testator, was only prescribed by the statute of frauds, to prevent a rash disinherison of the heir; but that since the execution of the will was fully proved, though the circumstances required by the statute had not been observed, yet it was the plain intention of the testator, that the devisee should have the estate; and that the devisee having the legal estate, it would be hard to take it from him in equity, and by those means to dispose of the estate against the intent of the testator, from the devisee, for want of a ceremony, when the *end* of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Nor will the subscription of the witnesses in the

^d 1 P. Wms. 239.

^e Lord Harcourt.

same room always satisfy the statute, or necessarily imply it to be in the testator's presence, for, as was observed by Lord Chancellor Macclesfield, in *Longford v. Eyre*¹, it might be done in a corner of the room in a clandestine and fraudulent way, and then it would not be a subscribing in the testator's presence. But his Lordship further said, that as it was sworn by the witness, that he subscribed the will at the testator's request, and in the same room, that could not be fraudulent, and was well enough.

Thus, therefore, the law upon this subject seems sufficiently settled upon this distinction, that if the attesting witnesses subscribe the will in such a situation with respect to the testator, as that it was not possible for him to have seen the act done by them, such will is void as to real estate for the defect of solemnity in its execution; but if their situation was such as to afford the testator the opportunity of seeing them subscribe, if he chose, their attestation under such circumstances will be good and valid, although in point of fact they were not seen by the testator in the very act of subscribing their names.

The mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point; for there must be a mental knowledge of the fact, so that, as a subscription clandestinely made in a corner of the

It is not enough that the testator is corporally present, he must possess his faculties so as to give him a mental knowledge of the fact.

¹ 1 P. Wms. 740.

same room with the testator, was not on this account a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone so as to constitute it an act done without his knowledge. On this principle was founded the decision of *Right v. Price*⁵, in which case, the form of an attestation was written on the second sheet, and they put their names to it in the room where the testator lay, but he was in a state of insensibility. And the question was, whether this will was duly executed for passing lands according to the statute of frauds?

In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, whether the testator, having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside, because a formality required, according to an implied intention of the legislature, has not been complied with; that it did not appear but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names; which, according to the law as laid down in *Shires and Glascock*, would have been sufficient.

⁵ Doug. 241.

But the court said, that they would lean in support of a fair will, and not defeat it for a slip in form, where the *meaning* of the statute had been complied with; this was the principle of Shires and Glascock's case, and other cases of that sort. But the case then before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental qualities. That it was usual, in precedents of wills, to say, that the witnesses subscribed at the request of the testator; that indeed was not expressly required by the statute, but the practice shewed the general understanding, and that the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case, the testator could not know whether the will that he had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property.

It seems not to have been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his hand-writing to the attestation, would be sufficient. In the case of *Risley v. Temple*^a, the facts were, that the testator lying sick in bed, made his will, and signed, sealed, and pub-

Whether an acknowledgment by the subscribing witness to the testator would be sufficient.

^a Skin. 107.

lished it, in the presence of three witnesses, but being tired ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names, and then returned and owned their names to the testator, who looked upon the will, and said, '*they have done well.*' But this point was not spoken to in the case according to the report.

It seems very plain, however, that to hold such an acknowledgment sufficient, would be in direct opposition to the words of the statute, which, though it does not by the 5th section require the *signature of the testator himself* to be in the presence of the witnesses, does yet expressly direct the *subscription of the witnesses* to be in the testator's presence; and therefore, this part of the ceremonial seems plainly inconsistent with the construction which has been applied to the act of the testator himself. And it seems little to be doubted, but that, agreeably to the greater regard for the words of the statute, which now seems to prevail in our courts of justice, such an acknowledgment by a subscribing witness, of his hand-writing to the attestation, made to the testator, after making the subscription out of his sight and presence, would be deemed an insufficient compliance with the statute.

That the witnesses may subscribe at different times.

It has been shewn, that a testator may *write*, and we shall now make it appear from the authorities,

that he may *publish*, his will at different times, or, in other words, that an attestation made by the witnesses respectively at three different times, if in the presence of the testator, satisfies the law (2). The two leading cases to establish this point are,

(2) It may be interesting to compare our own with the civil law upon this article. In an early period of the Roman jurisprudence, it was held, that a testament ought to be made *uno contextu*, without any foreign act intervening, and the witnesses were likewise required to attest, without separating, or even discontinuing the act of subscribing, till all was complete. And, indeed, it does not seem that the witnesses were ever released from the necessity of subscribing at one time and in each other's presence. In favour however of certain unavoidable interruptions, the Emperor Justinian limited and explained the generality with which the rule had been expressed. In the Sixth Book of the Code, tit. 23. 28. the qualification of the doctrine is thus propounded: *cum antiquitas testamenta fieri voluerit nullo actu interveniente, et hujusmodi verborum compositio non rite interpretata pene in perniciem, et testantium et testamentorum processerit: sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quadam dispositio secundum pristinam observationem celebratur (nihil enim ex ea penitus immutandum esse censemus), ea quidem quae minime necessaria sunt, nullo procedere modo, quippe causa subtilissima proposita, ea quae superflua sunt minime debent intercedere. Si quid autem necessarium evenerit; et ipsum corpus laborantis respiciens contigerit, id est, vel victus necessarii, vel potionis oblatio, vel medicaminis datio, vel impositio, quibus relictis ipsa sanitas testatoris periclitatur, vel si quis necessarius natura usus ad depositionem superflui ponderis immineat, vel testatori vel testibus, non esse ex hac causa testamentum subvertendum, licet morbus comitialis, (quod et factum esse comperimus) uni ex testibus contigerit: sed eo, quod urget et imminet, repleto, vel deposito, iterum solita per testamenti factionem adimpleri. Et si quidem a testatore aliquid fiat testibus paulisper separatis, cum*

Cook v. Parsons¹, and Jones v. Lake². The first of which cases was decided upon a bill of review to reverse a decree of Lord Nottingham in 1682, for a sale of lands subjected by the will to the payment of debts; the lands were devised by the testator to trustees, and their heirs, to set and to farm let, and out of the rents (without saying profits) to pay his debts; and all his debts and legacies being first paid, he gave the surplus to F. S.

¹ Prec. Ch. 185.² 2 Atk. 176.

coram his facere aliquid naturale testator erubescat, iterum introductis consequentia factionis testamenti procedere.

The phrase '*uno contextu*' is not to be understood as relating to the composition of the will, (which it seems might be taken up and prosecuted at intervals, according to the necessary interruptions of business, and as the leisure of the party allowed; as was said to be the law with us, in Carleton v. Griffin, above cited) but to the mode of publishing and solemnizing the will, by the formal *nuncupatio testamenti*, or *declaratio voluntatis* to the witness, with the ceremonies of subscribing and sealing by them, and the signing by the testator, which ought all to be done at one time, that is to say, *uno actus contextu*, without the intervention of any act or business foreign to the purpose, which the parties were met together upon, which, unless it happened on the natural and necessary occasions alluded to in the passage from the code above extracted, would vitiate the testament, as being inconsistent with the solemnity of its celebration. Thus Vinnius translates '*uno contextu*' into the Greek by *μια ὕφη*, and *αδιαλείπτως*, as being applicable not to the composition of the will, but to the publication of it; which is plainly the sense of it, as it stands accompanied in the text of the institutes, "*et testes quidem eorumque presentia, uno contextu, testamenti celebrandi gratia, &c.*"

This will was written with the testator's own hand, as was proved; and was published in the presence of three witnesses, at three several times, and they all attested it in his presence, but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will, as was proved by that witness. The testator died, leaving an infant heir, and the land was decreed to be sold, and no day given the infant to shew cause against it. One of the objections to the decree was—that this was no good will within the statute of frauds and perjuries, because not attested by all the witnesses at *one* time, and that one of them did not see the testator sign, but only hear him own that it was his hand.

But the Lord Keeper held a publication of a will before three witnesses, *though at several times*, to be sufficient, and thought the writing of the will with the testator's own hand (3), a sufficient signing within the statute, though not subscribed nor sealed by him, but doubted whether acknowledging the subscription to be his own would suffice (4).

(3) According to the Code 6. 23. 28. the writing of the will with the testator's own hand, dispensed with his signing; but it was added as a condition, *et hoc specialiter in scriptura reposuerit, quod hoc sua manu confecit*; but it dispensed with no other solemnity.

(4) This question has been already sufficiently discussed.

In *Jones v. Lake*, the case upon the special verdict was thus, The testator signed and executed his will in December, 1735, in the presence of *two witnesses*, who attested the same in his presence ; afterwards, in the year 1739, he with his pen went over his name, in the presence of a *third witness*, who subscribed his name *in the testator's presence*, and at his request. And the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend *they should be all present together* ; otherwise, there was not that degree of evidence which the statute requires ; for an attestation of three witnesses, at different times, *has only the weight of one witness*. Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time *two* witnesses attest, and insane when the *third* attests. It cannot be considered as a will, till the third witness hath signed, for that completes the act. The will was dated in 1735 ; suppose lands to be purchased after the date, and before the attestation by the third witness, would the lands pass ? certainly not."

On the other hand, it was argued for the devisee, that a will executed before three witnesses, *though at three different times*, was good ; the statute not requiring they should *all* be present at the *same time*. That the requisites under the statute were,

that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act did not mention, and in effect be making a new law.

The Lord Chief Justice Lee said, the case depended upon the words of the statute. The requisites in the statute, were, that *three witnesses should attest his signing*, but it did not direct that the three witnesses should be *all present at the same time*. Here, said the Chief Justice, you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. Judgment was accordingly given against the heir at law.

The judges, in the case of *Ellis v. Smith*,¹ admitted the authority of these cases, and drew from them an inference in favour of the validity of the testator's acknowledgment to the witnesses of his hand-writing to the signature of the will. "To strengthen the authorities I have already mentioned, said the Lord

¹ 1 Vez. jun. 11.

Chief Baron Parker, I shall take notice of the cases which allow the witnesses to subscribe at different times; and I think they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness, but having signed before one to *acknowledge* it only before the rest (5). The same conclusion was drawn by Lord Chancellor Hardwicke, Sir John Strange, Master of the Rolls, and Lord Chief Justice Willes. The last of whom observed, that the authorities not in point supported the decree more strongly than those in point, for they allowed the attestation and subscription of the witnesses at different times to be good; and the testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two. And in the opinion of the Master of the Rolls, to permit the witnesses to attest at several times, was to admit the asseveration of the testator that it was his will, to be equivalent to signing it before the witnesses; to which Lord Hardwicke added, that he differed from those who thought that the cases which had been mentioned, only supported the case before the court, by consequential reasoning; he thought them directly in point.

(5) In *Jones v. Lake*, (the last case produced,) the testator did run over his name again; but the principle of the decision implied the sufficiency of an attestation, made at three distinct times.

It is to be observed, however, that these decisions, in the opinion of the whole court, went too far, and opened the way to frauds, and particularly the Chief Justice observed with great force, that " he had known one man swear, that he did not see the testator sign, and the other two swear that he signed it before the three ; so might one man swear, that when he attested the will, the testator was insane ; another, that he was sane ; and thus an inlet was given to great frauds and impositions. But when they attested it *simul et semel*, they were a check upon each other, and such frauds were prevented (6); nay, said his

(6) This was certainly the doctrine of the civil law, from which the framers of the statute in question borrowed, in making this provision for preventing the forgery of wills. We have shewn that the words '*uno contextu*' related to the complex ceremony of publication, which was necessary to be done by a *continued* act. The attestation, therefore, which was an essential part of the publication, was necessary to be done by the witnesses, *simul et semel*, at the same time, at the same place, and in sight of each other ; not meaning, of course, by the *same* time, *eodem instanti*, but *uno actus contextu*, at one juncture, without break or interruption *, as the text of the Code (6. 23. 21.) well explains, distinguishing at the same time between the act of making and that of celebrating and publishing the will, to which last-mentioned act the words '*uno contextu*' are shewn to be only applicable. *In omnibus autem testamentis quæ presentibus vel absentibus testibus dictantur superfluum est uno, eodemque tempore exigere testatorem, et testes adhibere, et dictare suum arbitrium, et finire testa-*

* All solemn legal acts and ceremonies were necessary, by the civil law, to be executed without interruption, the common phrase to express which was, '*uno contextu absolvi.*'

Lordship, I think a *parol* disposition *before three*, full as solemn an act as a will in writing, attested by three *separatim*." He admitted, however, that the decisions were the other way, and that the point was established.

PART XVI.

Evidence of the Attestation.

IT has been already made to appear, that a will of lands may be sufficiently established in a court of justice, as to the testator's signature, by proof of his

mentum; sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficiet uno [tempore] eodemque die, nullo actu [extraneo] interveniente, testes omnes, videlicet simul, nec diversis [temporibus] scribere, signareque testamentum. Finem autem testamenti subscriptiones, et signacula testium esse decernimus. This exactness with respect to the simultaneous performance of the act of publication was retained out of the civil law, or *jus civilis*, when the civil and prætorian law were reduced into agreement, as I have before shewn: for the form and validity of a will, as ultimately established, was a tripartite constitution. The necessity of witnesses, and their presence at one and the same time, was founded on the *jus civilis*—the subscriptions by the testator and the witnesses on the imperial constitutions—the sealing and the number of the witness, was settled by the edict of the Prætor.

acknowledgment thereof. It will be proper now to consider, what is sufficient *proof* of the due *attestation* of such a will, according to the directions of the statute. We have seen that in a case of authority, upon a question before the court, whether or not it should be left to a jury, to determine as to the fact of a due attestation in the presence of the testator, where all the witnesses were dead; it was clearly held, that such question was proper for the decision of a jury, who might found their verdict upon mere circumstances and probabilities.

In the courts of common law, where a will of lands is produced, it is usual to call but one witness to prove it; but that is said only to be the case where no objection is made on the part of the heir, who is entitled to have all the witnesses examined, yet in such case the heir himself must produce the other witnesses, for the devisee need produce only one, if that one can prove all that is requisite to establish the validity of the will.* So that if the two other witnesses be called by the heir, and even refuse to verify their attestation, still the proof of their handwriting will be enough, if one of the three can prove the other circumstances of the execution. And, indeed, it has been held, that if they *all* swear that the will was *not* duly executed, the devisee may yet go into circumstances to prove the due execution. This

In the courts of common law, one of the subscribing witnesses may prove the attestation by the others.

And if *all* the witnesses deny their hands, still the devisee may go into circumstances to prove the due execution of the will.

* Gilb. Eject. Sect. 8. • Holt Rep. 742. Dayrell v. Glascock. Bull, N. P. 264. 1 Esp. N. P. Rep. 391.

was so ruled, as it appears^b in Lord Chief Justice Pratt's time, in a case of *Pike v. Badmering*, on a trial at bar, where the three subscribing witnesses to a will were called and denied their hands. The court permitted the plaintiff to contradict that evidence, and he supported the will against such testimony.

Whether the evidence of the subscribing witnesses can be received against their own attestation.

It appears, and with the greatest reason, that the evidence of subscribing witnesses against their own attestation has always been received, if received, with the utmost reluctance; and the courts have, on the other hand, been very ready to admit counter-testimony to establish the will against such suspicious and discordant depositions. In *Lowe v. Jolliffe*,^c which was tried at bar, upon an issue of *devisavit vel non* out of Chancery, the three subscribing witnesses to the testator's will, and the two surviving witnesses to the codicil, and a dozen servants of the testator, all swore him to be utterly incapable of making a will, or of transacting any other business, at the time of making his supposed will and codicil, or at any intermediate time. But this evidence was opposed by the depositions of several of the nobility and principal gentry of the county where the testator resided, who had frequently and familiarly conversed with him, during the whole period, and some on the very day on which the will was made; and also of two eminent physicians who attended him, and who

^b Strange 1096.

^c 1 Blackst. 365, 416.

all swore to his entire sanity and more than ordinary intellectual vigour (1).

The counsel for the plaintiff also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will; and read the deposition of the attorney, by whom the codicil was drawn and witnessed, (he being dead, and his testimony perpetuated in chancery), who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in dictating the contents of his codicil. Upon the whole, it appeared to be a very black conspiracy, to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded, that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to commit them in court, but they had withdrawn themselves. A prosecution of some of them for perjury was strongly recommended by the court; and the

(1) See some observations of Sir William Grant, the present Master of the Rolls, in *Burrows v. Locke*. 10 Vez. Junr. 474.

three testamentary witnesses were afterwards convicted, and sentenced, each of them, to be imprisoned for six months, to stand twice in the pillory, with a paper on their heads, denoting their crime, once at Westminster Hall Gate, and once at Charing Cross, and to be transported for seven years.

It is observable that, however the testimony of these subscribing witnesses against their own attestation was *ultimately discredited*, no doubt was entertained of their competency; as was remarked by the late Lord Chief Justice Kenyon, in commenting upon this case, in *Bent v. Baker* (2) who entirely approved of Mr. Justice Buller's distinction in this respect between *negotiable* and *other* instruments. So that the observation of Mr. Justice Yates, in the case of *Alexander v. Clayton*,^d viz. that "the witnesses ought not to have been admitted to give evidence against their own attestation," seems to have been too strong for the present doctrine, or perhaps incorrectly stated by the reporter.

It is one thing to offer testimony to destroy the validity of an instrument attested by one's own signature and subscription, and another to deny the *fact* of one's own attestation. *Lowe v. Jolliffe*, as above

^d 4 Burr. 2224.

(2) 3 T. R. 34. and see the reasons for this distinction in Mr. J. Buller's opinion, pronounced by him in the same case.

cited, is an example of the admissibility of the former species of testimony as well as of its liability to be impugned. It is plain, indeed, upon principles that a man ought to be admitted to deny what appears to be his own attestation; for to exclude him on a ground of inconsistency and contradiction, is to take for granted against him what is itself a primary object of proof. But it is equally clear, that his denial may be discredited and overthrown by the counter-testimony of the other witnesses, and that the will may be established against such a denial. Thus in the case of *Alexander v. Clayton*, mentioned above, Mr. Justice Yates observed, that there were many cases where one of the witnesses had supported a will, by swearing that the other two had attested, though they both denied it. And upon the same occasion it was said by Lord Mansfield, that "he had known several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witness, against that of the attesting witnesses who had denied their own attestation. It would be, added his Lordship, of terrible consequence, if witnesses to wills were to be tampered with to deny their own attestation."

Thus, therefore, the law appears to be well settled and discriminated upon these important points of evidence; and it is to be observed, that the present consideration is confined to the case of subscribing witnesses; and that therefore there is nothing in what

Of the doctrine laid down generally by Lord Mansfield, in *Walton v. Shelly*.

has been stated, or produced, which contradicts the maxim of law, as it was recognized, or decided upon in *Walton and others v. Shelly*^c, that *no man shall be suffered to give evidence to invalidate his own instrument*; nor does it seem that Lord Mansfield, in pronouncing his judgment in that case, laid down the rule with greater latitude than accords with the settled distinction, *as to the testimony of subscribing witnesses*, above adverted to. “What strikes me, said his Lordship, is the rule of law, founded upon public policy, which I take to be this—that no PARTY who has signed a *paper* or *deed*, shall ever be permitted to give testimony to invalidate that instrument which he has so signed.” Now it is plain, that a subscribing witness to a deed or will, is in neither case, by force of such subscription, a PARTY to the instrument.

A distinction between the attestation of wills and deeds, in respect to the point under consideration.

It is true, indeed, that the admission of a subscribing witness to a will to invalidate *that* instrument, forms a stronger case than where such witness comes to destroy the validity of a *deed* which he has attested; since, in the latter instance, he attested only the execution, and not the intrinsic or general validity of the instrument; but in the former, the testamentary capacity of the testator, as well as his formal execution, is verified by the subscription of the witness; not to mention also that such subscription is essential to the constitution and perfection of the instrument itself, so that in giving testimony

against the validity of the will which he has attested, he comes to overthrow that which he himself was *actively* and *instrumentally* concerned in establishing.

It seems probable, therefore, that the consideration of these peculiarities, belonging to the attestation of wills, suggested to Lord Kenyon a foundation for the resemblance, which, 'in the case of *Adams v. Lingard*', his Lordship appeared to think there existed between the case of an indorser of a bill and a subscribing witness to a will, as to the admissibility of their evidence to overthrow the instrument to which they had given credit by their signature. In this case, which was that of an indorser of a bill, the late Chief Justice said, that he wished the point to be settled in the House of Lords, being then of opinion, that the indorser was a witness proper to be heard, and other judges being of a contrary opinion. He then mentioned a case which was before Sir Joseph Jekyll, many years before, and another, which had been decided since, meaning that of *Lowe v. Jolliffe*, above stated, wherein his Lordship said, it had been determined at a trial at bar, that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

And of negotiable instruments and other instruments.

But when the question came before the court on a motion for a new trial (his Lordship still adhering to his former opinion) it was said by Buller, J. that

[†] Peake, Ni. Pr. Ca. 117.

“ the case before them was very different from that of witnesses to a will. The indorser had passed that *negotiable* instrument to the plaintiff as a good and valid security, and it would be attended with consequences most injurious to society, if these securities might be cut down by the persons passing them ; it was only for two men to conspire together to cheat all the world.” It is remarkable, that in the much considered case of *Bent v. Baker*, which was determined three years before that of *Adams v. Lingard*, Lord Kenyon expressed his entire acquiescence in the distinction as to this point, between negotiable instruments, and deeds and wills.

Of the proof to establish a will of lands in courts of equity.

The reader has been shewn above, that the testimony of one of the three witnesses is enough to prove a will of lands, in a court of common law. He will find the same rule of evidence laid down in early cases, with respect to the mode of establishing a will in the courts of equity. Thus in the case of *Longford v. Eyre*^s, Lord Macclesfield makes the following observation: “ The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator ; and then *one witness proves the full execution of the will*, since he proves that the testator executed

it; and likewise, that the three witnesses subscribed it in his presence.

But in the case of *Townsend v. Ives*^b, which came on about twenty-five years afterwards in the Court of Chancery, where the bill was preferred by the legatees, whose legacies were charged on the real estate, to have the will established, the rule was peremptorily laid down, that ALL the witnesses, if living, must be examined, to prove a will of lands. Thus also Lord Camden, in the above cited case of *Hindon v. Kersey*, in speaking first of the method of proof in a court of common law, says, "one witness is sufficient to prove what all the three have attested; and though that witness must be a *subscriber*, yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must always be produced, *because he is the best evidence*. This we see in common experience; for after the *first* witness has been examined, the will is always read." But the same judge speaking afterwards of the course of the Court of Chancery in this respect, expresses himself thus: "Sanity is the great fact which the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become

The settled rule now is, that *all* the witnesses, if living, must be examined.

^b 1 Wils. 1748.

the invariable practice of that Court, never to establish a will, unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor."¹

If one of the witnesses be dead, proof of his hand-writing may be read.

But if one of the witnesses be dead, a will may be read, on proof of his hand-writing, though this must be accompanied by positive and satisfactory proof, that he is dead. Thus in *Bishop v. Burton*^k, the plaintiff being put to prove the will, the proof was of the hands of the devisor, and of two of the subscribing witnesses, who were proved to be dead; and as to J. B. the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believed it to be true, that he died two years before, and believed his name subscribed was his proper hand-writing. But the Court was of opinion, that *that* was not sufficient proof to have the will read in evidence.

Whether the hand-writing may be proved where a witness is beyond sea.

In *Grayson v. Atkinson*^l, an objection was made for the defendant, that one of the witnesses being beyond sea, and the others not having sworn that the testator acknowledged his hand-writing to the third,

See *Ogle v. Cook*, 1 Vez. 177. all must be examined or a reason given why any one is not. But in *Powell v. Cleaver*, 2 Bro. C. C. 504. Lord Thurlow said the practice had been so; but he doubted whether the rule had ever been laid down so largely.

^k Comyns Rep. 614.

^l 1 Vez. 459.

who was abroad, and there being no proof about him, the will could not be established: on the other side it was contended, that the same credit was to be given to his hand-writing *as if dead*. But the Lord Chancellor Hardwicke, doubted thereof, and said, "he did not know that it had been determined, that the same credit was to be given to the hand-writing of a witness beyond sea, as if dead, because it was not necessary to presume the impossibility of getting at him, and he was apprehensive fraud might be used. It not being proved that the testator published his will in the presence of the other witness, but only of those examined, and that the other witness, subscribed in their presence, it stood on the proof of the attestation. If the witness was dead, it might possibly be sufficient. That was the act of God, and therefore the court gave credit to his hand-writing. But in this case you may have a commission to examine the witness beyond sea."

In the case of Lord Carrington v. Payne^m, however, a question was made, whether, one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined. Lord Alvanley, then the Master of the Rolls, held that it was not necessary to have his examination; but that *it was the same as if he was dead*. But his Honour seemed to found this

^m 5 Vez. jun. 411.

resolution on the submission of the heir, who, he observed, did not make a point of it. He mentioned a case, however, of Mr. Fitzherbert, where one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad. And where, in another case before Lord Chancellor Thurlow, it was urged that one of the witnesses to the will was abroad, his Lordship said^a, he doubted whether the rule had ever been laid down so largely as, that the will *could not* be proved, without examining *all* the witnesses, although the *practice* has been to examine all.

The hand-writing of a witness, who since the subscription has become insane, may be proved.

This rule has been relaxed in other instances, where, to have rigidly adhered to it, would have imposed impossibilities upon persons coming into equity to establish these instruments. As, where a witness to a will of real estate had since become insane, proof of the hand-writing of such witness was allowed^o. And in a very late case at the Rolls, proof even of the hand-writing was dispensed with, in the case of an old will, which appeared by the date to have been made 30 years before, the testator having been dead above 20 years, and no account being to be obtained of one of the subscribing witnesses. The hand-writing of two of the witnesses was proved.

And in the case of an old will, where no account can be given of a witness, proof of the hand-writing may be dispensed with.

And his Honour observed, that he did not see how a will could be distinguished from a deed as to this point; only that the former, not having effect till the

^a 2 Bro. C. C. 504. ^o Bennet v. Taylor, 9 Vez. jun. 381.

death, wanted a kind of authentication which the other had. That was from the nature of the subject. But he thought the proof sufficient in that case ; for in a late case (3) in the Court of King's Bench, an inquiry of just the same kind was held sufficient, which excluded the question. In that case they had made all inquiry, and could hear nothing of the witness.

PART XVII.

Personalty.

WITH respect to personal estate, except the will be made and proved according to the forms required by the 19th, 20th, and 21st sections of the statute, to validate the nuncupative testament, or where it is

(3) *Cunliff v. Sefton*, 2 East. 183. where, in an action upon a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses, at the places of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or of any circumstance relating to him, it was held sufficient to let in proof of the *hand-writing of the other subscribing witness*, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

the case of soldiers in actual military service, (who, by virtue of the 23d section of the said statute, may still make nuncupative wills without the necessity of observing the forms to which nuncupative testaments are subjected by the preceding clauses,) all testamentary dispositions thereof must, since the statute of frauds, be in writing.

The Ecclesiastical Courts, to whose jurisdiction the establishment of personal testaments appertain, require no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. Swinburn seems to have considered it necessary, indeed, that a testament of chattels should be published in the presence of two sufficient witnesses^a; and Bracton^b appears to have held the same opinion; or rather, according to Sir William Blackstone, to have copied implicitly the rule of the civil law. For it is not to be doubted, but, that a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication*, is effectual, provided the hand-writing can be sufficiently proved^c. And though it be written by another person, by the testator's direction, without even having been signed by the testator, if it can be shewn to have been made according to such instructions, and to have received

^a Vid. Swinb. on Wills, pt. 1. sect. 3. ^b Lib. 2. c. 26.

^c Godolp. O. L. p. 1. c. 21.

the approbation of the testator, it will be effectual to pass the personal estate⁴.

The proof of the will may be in two forms, of which one is called the vulgar or common, the other is termed the solemn form or form of law. If the will be not contested, the executor or administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, may prove it by his own oath, or as it is said; in some dioceses in York, with the additional oath of *one* witness, before the ordinary or his surrogate. But if the validity of the will be disputed, it then becomes necessary to prove and establish the will in the solemn way, or, as Swinburn expresses it, in form of law ; that is, *per testes*, in the presence of such persons as would be interested if the deceased had died *intestate*. Two witnesses must then be sworn and examined upon interrogatories administered by the adverse party. Between which two forms of proving a will, there is a substantial difference of effect, for after an informal proof the executor may be compelled again to prove the will in due form of law, which may be inconvenient if the witnesses are dead in the mean time. The executor may, therefore, if he please, for greater safety, if he himself have an interest in the will, elect to have the will proved in the more solemn form⁵, and in such case he must cite the persons who would

Of proving a will
in the common
and solemn forms.

⁴ Limbery v. Mason and Hide, Comyns, 452. Gilb. Rep. 260.

⁵ Burn. Eccl. L. 208.

be interested under an intestacy, to be present at the probation thereof. If the will is only proved in the *common form*, it may at any time within 30 years be disputed^f, but if the solemn form be pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy^g.

When a will is proved by the probation of the more formal or solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses, is followed in our Ecclesiastical Courts. And such witnesses must be able, at least, to depose, that the testator declared the writing produced to be his last will and testament, unless where the will or codicil was written by the testator himself; in which case, as has been above observed, the validity thereof may be established upon proof of the hand-writing only, but it ought to be by the evidence of such as have seen him write^h; and though this evidence ought, in general, to be given by two witnesses, yet, if there be one subscribing witness, who appears to attest the fact of the identity of the will, the testimony of a single witness is said to be sufficient. And where the will has been wholly written by the testator, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the spiritual court. The general neces-

Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts.

^f Godolph. O. L. 62.

^g 4 Burn. Eccl. L. 207.

^h See the case of *Eagleton v. Kingston*, 8 Vez. jun. 438.

sity for the evidence of two witnesses is borrowed from the Roman law; the máxim of which is, that one witness alone cannot be heard, or, in other words, is no witness at all¹. “*Unius responsio testis omnino non audiatur* (1).”

We have seen, that notwithstanding the rule of the Roman law, that *nemo testis esse debet in propria causa*, legataries were permitted to give evidence in support of a will, upon the distinction between particular and universal successors; but by the practice of the Ecclesiastical Courts of this kingdom, no legatee can be received to give his testimony to establish a will of personal estate, until his interest has been removed by his receipt of the value of his legacy, or he has renounced it and discharged the executor.

But as to the *form* of the instrument itself, the Ecclesiastical Courts are not scrupulous. A memor- Of the form of
the testament.

¹See the case of *Thwaites v. Smith*, 1 P. Wms. 13.

(1) Cod. 4. 20. 9. Where the Ecclesiastical Court proceeds in a matter merely spiritual, or confined to their own jurisdiction, no prohibition lies, if their proceedings are contrary to common law; as if they refuse the testimony of one witness. But if they disallow the proof of a temporal matter, by one witness, though such temporal matter be incident to a matter within their jurisdiction, a prohibition lies from the temporal courts. 1 Show. 158, 172. *Shatter v. Friend*, and see H. H. C. L. 5th edit. and the note (q) by the Editor.

Determinations
of the Ecclesiastical
Courts on
this subject.

andum or scrap of paper, written^{*} by a person in contemplation of death, and with a design to make it operative after that event, may be proved in that court as testamentary, and, if so received, it seems a court of equity will support it. A string of examples might be cited to illustrate this observation; many were produced in the case of *Limbery and Mason v. Hyde*¹; among which, that of *Loveday v. Claridge* is strong to the purpose.

The testator intending to make his will, pulled a paper out of his pocket, and wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish, (for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay a dividend of stocks;) yet it was held to be a will.

Thus too, in a case where a woman possessed of considerable real and personal property, wrote a letter to an attorney, her friend, giving him an account how she would dispose of the same, and in her ignorant way, added, "*please not to put this rigma-roll in till I find it correct—this only by way of memorandum in case I should go off suddenly.*" And the testatrix survived the writing of that letter three or four months, but took no further steps

^{*} Vid. *Cox v. Basset*, 3 Vez. jun. 158.

¹ Com. 452. and see *Downing v. Townsend*, Ambler 280. 592.

therein, Sir George Hay was of opinion, that, under the circumstances, such letter could not operate as the will of the deceased; but on an appeal, the Court of Delegates reversed his sentence.

In *Cobbold v. Bowes*, a gentleman gave instructions to his attorney to prepare his will for the disposition of his real and personal estate. The will was accordingly prepared; settled by the testator and engrossed for execution with the usual clauses of attestation. This will was of considerable length, and at the left-hand corner of each sheet of paper was the word '*witnesses.*' Upon the death of the deceased, the will was found with his name subscribed to each sheet, and, opposite to the seal, on the last sheet, but not witnessed. Dr. Calvert, the then judge of the Prerogative Court, was of opinion, that the deceased, *by permitting the clause of attestation to remain*, had bound himself down to a formal execution, and therefore pronounced against the will; but on appeal, the Court of Delegates reversed such sentence, and thereby rendered the will valid as to personal property (2).

To the same effect was that of *Wright v. Walthoe*, cited in *Limbery v. Mason*^m, where there were three

^m Com. 452.

(2) See these cases more at large in a note by the Reporter to the case of *Matthews v. Warner*, 4 Vez. jun. 200.

testamentary schedules, whereof one was without date; to the second the words '*in witness*' were subjoined; and the third concluded abruptly: yet, being written by the testator, they were declared to be his will. In the same manner, and about the same time, *viz.* in the year 1711, in a case of *Worlick v. Pollett*, before the Delegates, where the testatrix had sent for a person to make her will, and given him instructions for the same, and the will was accordingly drawn, read to, and approved by her, and declared by her to be her last will, and three witnesses were sent to see her execute, the words signed and sealed being already written, but she died before any other execution, it was held a good will before the Delegates, who affirmed the first sentence which had been reversed upon an appeal.

And again, in a cause of *Brown v. Heath*, determined in 1721, where a will of real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will of the personal estate, and though more was intended to be done, yet it was adjudged that it should be good for what was done.

But the later determinations at Doctors Commons, seem tending to establish a more discriminative doctrine. It now appears to be agreed, that if a testator leaves an instrument, which, upon the face of it, carries evidence of an intention in the framer to

perfect it by some further solemnity, which he died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased. Thus, in a late case, where a person had written a paper, purporting to be a disposition of his property, to which a clause of attestation was added, but not filled up, sentence, as I am informed, was pronounced for an intestacy upon an inference, from this omission, of change of intention. And, where another person had sealed the paper propounded for a will, without signing it; a similar determination was given upon a similar ground.

Griffin v. Griffin (3), determined at the Commons a very few years ago, was decided upon the same principles. Richard Griffin executed a testamentary paper, dated 27th September 1777. On the 18th of January 1789, he began a paper, and having written no more than the commencement of what he meant to do, being called away to dinner, he locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of the peace. The questions were, whether this unfinished paper was a revocation of the former paper

(3) Cited in *Matthews v. Warner*, 4 Vez. jun. 197. note (a) and see *ex parte Fearon* 5 Vez. jun. 644.

executed in 1777: or, whether it was to be established substantively, and conjunctively with the former paper. It was determined, that the unfinished paper could have no effect; the testator having lived eight days after making it, in health and capable of business; and not having concluded it, the presumption of law, even if there had been no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger as there was an executed paper.

The same doctrine is recognized by Lord Eldon, in the late case of *Coles v. Trecothick*^a, who thus expresses himself on the point: "The observation is just, that as to personal estate, if it appear upon the will, that something more was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will."

Of the principle on which the Courts act in receiving or rejecting informal papers as testamentary.

It seems, therefore, to be now understood, that not *every* scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the Ecclesiastical Court as testamentary; but it must appear, and that from the paper itself, and not from extrinsic evidence, that the writer intended the paper to operate as it stood when it was written, without contemplating any *farther act* to be done to give to it its perfection and full au-

^a 9 Vez. jun. 249.

thenticity; and this intention, every such paper, if it contains dispositions of personal property prospectively to the decease of the party, will be held to import, unless by its mode of expression or manner of execution, it discloses a suspended intention in the party framing it.

It seems hardly necessary to say, (the proposition being implied in what has gone before,) that the paper must appear to be written with the actual design of disposing after death of the property in question. There must be the *animus testandi*, which is rendered in the Touchstone^o, by the expressions of "a mind to dispose—a firm resolution and advised determination to make a testament; for it is, says that book, the *mind* not the *words* which doth give life to the testament." Therefore, continues the same author, "if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, write to say, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded." Upon the whole, therefore, the mind and intention seems to be every thing—the manner nothing. Insomuch, that if a testator, by a paper, subsequent to his will, says he has bequeathed personal property, which in fact he has not bequeathed, the paper may be proved as testamentary, and the property may pass by it^p. And

^o 404.

^p 6 Vez. jun. 397.

even an indorsement on a note, "I give this note to A." it is said may be proved as testamentary¹. But it is worthy of observation, that where a testator had left five testamentary papers, inconsistent with each other, and probate of all had been granted in the Spiritual Court, Lord Eldon lamented that there was no solemnity necessary for personal estate, and that he thought it would be expedient to apply the provisions of the statute of frauds to personal estate².

Of nuncupative
wills and revo-
cations.

Nuncupative revocations of personal wills, deliberately made and solemnly executed, were likewise an object of special prohibition by the legislature in the statute of Car. 2, which, in the 22d section has enacted, that "no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at least."

A remarkable case³, which happened in Lord Nottingham's time, has been said, to have given rise to

¹ 4 Vez. jun. 565. Chaworth v. Beech, and see 3 Vez. jun. 160.

² 5 Vez. jun. 280. Beauchamp v. Lord Hardwicke, 4 Vez. jun. 208.

³ Vide Matthews v. Warner, 4 Vez. jun. 196. note (a).

this clause. Mr. Cole, at an advanced age, married a young woman, who, during his life, did not conduct herself with propriety. After his death, she set up a nuncupative will, said to be made *in extremis*, by which the whole estate was given to her, in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the Delegates, from the sentence of the Prerogative Court in favour of the written will, Mrs. Cole offered to go to a trial at law in a feigned action, submitting to be bound by the result. Upon the trial at the bar of the court of King's Bench, it appeared, that most of the witnesses for the nuncupation were perjured; and that Mrs. Cole was guilty of subornation. After that, she applied for a commission of review, which was refused; and, upon that occasion, Lord Nottingham said, "I hope to see, one day, a law, that *no written will* shall be revoked but by *writing*."

Positive dispositions by nuncupative testaments are not laid by the statute under the same restraint in respect to writing, but, as Sir William Blackstone observes¹, the legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of but in the only instance where favour ought to be shewn to it,

¹ Comm. 2 vol. 500.

when the testator is surprized by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, and, as the same learned writer observes, not in any loose idle discourse ; for he must require the bye-standers to bear witness of such his intention. The will must be made at home or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers. It must be in his last sickness ; for if he recovers, he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses ; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprize. To which we may add, that no such will is available, where the estate thereby attempted to be bequeathed exceeds the value of 30l.

Of the qualification of witnesses to establish a nuncupative testament.

By perusing the clause at the head of the chapter, or in the statute at the end of the volume, standing first in the appendix, the reader will at once be possessed of all that relates to this subject ; and by referring to the 2 Ann, c. 16. he will find it thereby enacted, that " all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto."

And of the degree of evidence.

It is to be remarked, that the words in this clause

are, that "no nuncupative will shall be good, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; whereby the construction is excluded, which, we have seen, has allowed the publication of a written will of lands to be established by the proof of any one of the three subscribing witnesses. Dr. Shallmer", by will in writing gave 200*l.* to the parish of St. Clement Danes: and afterwards, Prew, the reader, coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church: at which, though Dr. Shallmer was at first disturbed, yet afterwards, he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the Doctor's widow put down a memorandum in writing of the said last devise, and so did her maid; Prew died about a month afterwards, and amongst his papers was found a memorandum of his own writing, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.* and purporting that he had put it in writing the same day it was spoken; but that writing which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not expressly agree.

About a year afterwards, on the application of the

parish to the Commissioners of Charitable Uses, and their producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200 l. But on exception taken by the executors, the decree was discharged of this 200 l. and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the *proof* shall be by the *oath* of three witnesses.

And by force of the 21st section, until probate has been obtained of a nuncupative will, it cannot be set up in pleading against the administrator, as appears by the case of *Verhorn v. Brewen*^{*}, where an administrator brought a bill to discover and have an account of the intestate's estate; and the defendant pleaded, that the supposed intestate made a *nuncupative will*, and another person executor; to whom he was accountable, and not to the plaintiff, as administrator. But it was decreed, that though there were such a nuncupative will, yet it was not pleadable against an administrator before it was proved.

Of altering a
written will by
a nuncupative
disposition.

It is clear from what has been already shewn, that no nuncupative disposition, though made and published with the due formalities prescribed by the 19th and 20th sections, can make any alteration in a

^{*} 1 Chan. Ca. 192.

written will, by reason of the restriction in this particular contained in the 22d clause of the statute. Yet if a legacy given by a written will has lapsed, or was void for some legal objection, such legacy might be the subject of a nuncupative disposition. Thus, where one G. S. (4) on the 2d of September, 1679, made his will in writing, and appointed E., his wife, his executrix, and gave all the residuum of his estate, after some legacies paid, to her, and the wife died in the testator's life-time, who afterwards made a nuncupative codicil, and gave to another all that he had given to his wife, and died; and the single question was, whether this nuncupative codicil was allowable, notwithstanding the 22d section of the statute of frauds; it was resolved by Sir Hugh Wyndham, Justice, Sir Thomas Raymond, and several civilians joined in the commission, that the nuncupative codicil was good; for, by the death of the wife before the testator, the devise of the residue was totally void, and so there was no will as to that part.

The nuncupative codicil was, therefore, in the foregoing case, a new disposition, as to so much, because there was no will, its operation being determined. And it was objected, that, by the same reason, if any part of a will in writing was made by force or fraud, the thing

(4) Sir Thomas Raymond, 334. before the Delegates at Serjeant's Inn, December 9, 1679.

so given and specified in that part, may be devised by a nuncupative codicil, and so the will might be altered contrary to the words of the statute: but it was answered by the Court, that if such part of a will was so obtained, it was *no* part of the will, and so such codicil would be no alteration of what was not, but would be an original will for so much. And they further said, that if A. be possessed of an estate of 1000*l.* and by will in writing, gives a part of it as 500*l.* to B. he might give the residue by a nuncupative will, so as he did not change the executor.

It has been held, that a disposition, not valid as a nuncupative will, for want of the observance of the formalities required by the statute, may be supported as a trust in equity. The case cited in support of which proposition, is that of *Nab v. Nab*^r, where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and gave several legacies, and made her mother executrix, but took no notice of the 180*l.*; but afterwards, by word of mouth, desired her mother, if she thought fit, to give the 180*l.* to her niece; and on a bill filed by the niece for this sum, it was proved in the cause, for the plaintiff, that the daughter, after making the will, had said, she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter appeared only by the answer of the mother upon oath.

It was agreed, that this was not good as a nuncupative will, being above 30*l.* and not reduced into writing within six days after the speaking, as the statute of frauds requires. But the mother was decreed to be a trustee for the niece. I find no other case that comes up to this doctrine, and, perhaps the courts will not hereafter, if the point should arise, be disposed to be guided by a single precedent, so opposite to that feeling of regret which, of late, they uniformly express in being forced into a departure from the plain and wholesome provisions of the statute, by the stress of authorities.

By the 23d section of this statute, soldiers in actual military service, and mariners and seamen at sea, are excepted out of the clauses restraining the testamentary power, in respect to personal estate. Soldiers may still, therefore, make nuncupative wills, or revocations of personal estate, and dispose of their goods, wages, and other chattels, without the forms required by the law in other cases. And by statute 5th William 3. c. 21. sect. 6. the probate of any common soldier, was and continues to be exempted from the duties imposed by that act. With respect to seamen, however, the power of making nuncupative wills left to them by the statute of frauds in the unfettered state in which it stood previous to that statute, has been laid under restrictive provisions by subsequent statutes, for their better security and protection against fraud and im-

Of soldiers' and
seamen's wills.

position. The regulations which regard this object will be found in the abstracts of the statutes, 26 Geo. 3. cap. 63. and 32 Geo. 3. cap. 34. subjoined to this volume, for the convenience of reference

PART XVIII.

Charitable Uses.

THE progress and changes of the law under the various provisions by statute, in respect to gifts in mortmain, deserve to be distinctly treated of in a work upon wills and testaments.

Statutes of
mortmain.

A gift in mortmain, was a phrase signifying a donation of lands or tenements to corporations, sole or aggregate, and implying that by such a gift as well the fruits of tenure due for such property to the Lord of the fee, as the services due out of such fees for the defence of the realm, became extinguished and lost, and the lands were as unproductive as if they were in the hands of a dead man. By Magna Charta it was therefore provided, that "it should not be lawful for any one to give his lands to any religious house, and to take the same again to hold of the same house; nor should it be lawful to any house of religion to take the lands of any, and to lease the same to him from whom they received it.

And if any from thenceforth should give his lands to any religious house, and thereupon be convict, the gift should be utterly void, and the land should accrue to the Lord of the fee."

A great many subsequent statutes became necessary to defeat the devices of the ecclesiastics, (who, in early times, were the persons most learned in the law,) to elude restraints which went in a great measure to cut up the sources of their wealth and accumulations. Thus the statute de religiosis, 7 Ed. 1. st. 2. after reciting the prevailing artifices whereby the former prohibition had been evaded, ordained that "no person, religious or other, whatsoever he be, should buy or sell any lands or tenements under the colour of gift or lease, or receive by reason of any other title, whatsoever it be, or by any other craft or engine, lands or tenements, under pain of forfeiture of the same." But this statute being held to extend only to gifts, alienations, and other conveyances, the ecclesiastics evaded it, by pretending title to the land which they were desirous of obtaining, and so recovering it in an action, by collusion with the tenant*. By the 13th Ed. 1. c. 32. they were precluded from acquiring lands by purchase, gift, lease, or *recovery*; whereupon they resorted to the method of causing the lands to be conveyed to other persons and their heirs, to the use of them and their successors; which answered for some time, till by the statute 15 Ric. 2. c. 5. this was also

* 2 Inst. 75.

enacted to be mortmain, and within the forfeiture of the statute de religiosis. But as the statute of Richard was held only to extend to *corporations*, the statute 23 H. 8. c. 10. carried the prohibition to parish churches, chapels, guilds, fraternities, commonalties, companies, or brotherhoods, without corporation.

But it still continued to be held^b that lands might be given to any persons and their heirs, for the finding of a preacher, maintenance of a school, relief of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry and poor apprentices, and for the marriage of poor virgins, or for any other *charitable uses*. And it was further held, that by obtaining proper licences from those who would be entitled to the forfeiture (1), alienations in mortmain might still be made, as appears from the

^b 1 Rep. 26.

(1) These grants in mortmain were never avoided so as to let in the heirs at law; but the title by the forfeiture was given to the King or the mesne lords. The Statute of Wills, 32 H. 8. c. 1. gave a general power of devising, but the explanatory act, 34 H. 8. c. 5. excepted corporations; so that devises to corporations were *void*, and could not be dispensed with by *licence*; and by consequence let in the *heir*, from the passing of the stat. of 34 H. 8. c. 5. to the 43 El. c. 4. except where there happened to be a custom for devising in mortmain. See the Year Book, 45. Ed. 3. 26.

preamble of the stat. de religiosis^c. The Kings of England for the most part grounded their pretensions to this power of licensing on the right, asserted by them to be inherent in the crown, to dispense with Acts of Parliament: which dispensing power was found to produce such dangerous consequences in the exercise thereof by James II. that in the first year of the reign of William it was enacted, that no dispensation by non obstante to any statute should be allowed, but that the same should be held void and of none effect, except a dispensation be allowed in such statute^d. But by the subsequent statute 7 and 8 William 3. c. 37. power to licence in mortmain was expressly given to the crown, and the 2d and 3d Anne, c. 11. enabled any person, by deed enrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, lands or goods, without licence.

By the 4th El. c. 14. special provision was made by Commissioners, to be named by the Lord Chancellor or Chancellor of the dutchy of Lancaster, within the county palatine, to enquire by the oaths of twelve men into all charitable gifts and appointments, and the management and application of them, and to make orders and decrees concerning their administration: which statute was construed to supply all defects of assurances, where the donor was of a capacity to dispose, and had an estate in any way disposeable by him: as if a copyholder disposed of

^c 2 Inst. 74. and see the statutes 18 Ed. 3. St. 3. c. 3. 17 Car. 2. c. 3.

^d 4 Hawk. P. C. 348. Harg. Co. Litt. 120. n.

copyhold lands to a charitable use, without surrender, or tenant in tail conveyed without fine, or a reversion was granted without attornment, all such like defects were supplied by this statute, and considered as good by way of appointment (2).

Charitable gifts;
favour shewn to
them.

The Court of Chancery will, however, relieve by original bill upon a gift to charitable uses within the statute; and, proceeding on the principle of the statute, has shewn great favour to charitable donations. Thus a legacy given *generally* to a *public charity* has been considered as sufficiently certain, and the executors have received the directions of the Court as to the disposal of it*. And where a charge of 1000*l.* on a manor was to be applied to such charitable uses as the testator had by writing under his hand directed, equity supported the bequest, though no such writing was found†. Thus also where there was a gift of the residue of personal estate to such charitable uses as the *executor* should appoint, though the executor died in the life-time of the testatrix, the devise was carried into effect‡. And a

* 1 Bro. C. C. 13. *Widmore v. the Governors of Queen Ann's bounty.*

† 1 Vern. 224. *Attorney General v. Syderfin.*

‡ 3 Bro. C. C. 517. *Moggridge v. Thackwell.*

(2) That devises to corporations were under that statute considered good by way of appointment See Hob. 136. Moor, 888. 1 Lev. 284. But note that the words 'limit and appoint' in the statute did not carry the legal estate, but operated only as a gift of the *utile dominium*, to bind the legal estate in the hands of the heir.

devise to charitable uses, declaring no use, has been supported; in which case the King appoints under his sign manual^b. So also where the charity has been against the policy of law, the same prerogative holds; as where it was to establish a jesuba to teach the Jewish religion^c; or to educate poor children in the Roman Catholic faith^d. And where a charity has been so given as that there can be no objects of it, it seems that the Court will order a different scheme to be laid before it^e. Thus where a trust was created for the propagation of the Christian religion, among the natives of New England, there being no infidels to convert within the intended limits, and the colleges which were appointed to administer the charity having become subject to a foreign power, the master was directed to propose a plan *de novo* for the application of the produce of the estates according to the general intentions of the testator^f. Thus also, upon the same principle of favour, where a residue of personalty is left to charitable uses, which proves to be more than sufficient for the object, if it appear to be the testator's intention to dispose of the whole surplus that way, the remainder will be applied to similar purposes^g. The Court is also very indulgent to charity

^b Ambler 712, Attorney General v. Herrick.

^c Ambl. 228. Da Costa v. De Pas. Reg. lib. A. 1754, fol. 309.

^d 7 Vez. Jun. 490. Cary v. Abbot.

^e 3 Bro. C. C. 166. Attorney General v. Oglander.

^f 3 Bro. C. C. 171. Attorney General v. the City of London.

^g 3 Bro. C. C. 373. Attorney General v. the Earl of Winchelsea. See this doctrine of *cy pres* as applied to the execution of a charitable use, where the express object fails, in 7 Vez. Jun. 324.

cases in matters of form. Thus where the information prays a wrong relief, the Court will give such relief as will do justice^o, and holds out its assistance to charities under circumstances in which it would not give relief in ordinary cases^p, and often gives the relators costs beyond the taxed costs^q.

Statute of Geo. 2.
called the Mort-
main Act.

The statute 9 Geo. 2. c. 36. enacts, " that from the June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift,

and see Digest xxxiii. Tit. 2. de usu et usufructu legatorum. Bishop of Hereford v. Adams. 11 Vez. Jun. 367. Attorney General v. Whitely.

^o 1 Vez. 12. 43. 413. 11 Vez. Jun. 247.

^p 11 Vez. Jun. 367. And as to the extent and comprehension of the term 'charity' in a proper legal sense, and what description of objects are brought within the same indulgence, see 10 Vez. Jun. 522. Morrice v. Bishop of Durham, and the case of Downing College, in Wilmot's opinions and judgments.

^q 7 Vez. Jun. 425.

conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be made by deed, indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be enrolled in his Majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such grantor or donor, (including the days of the transfer and death) and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." And by the 3rd section, all gifts or transfers made in any other manner or form than is directed by this statute, are declared to be void. By the 2nd section, gifts or transfers for valuable consideration actually paid, and bona fide made, are excepted. The 4th section provides that the Act shall not extend to make void the dispensations of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or

form than by this Act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the same colleges. But by the succeeding section these colleges are restrained from holding or enjoying more advowsons than shall be equal in number to a moiety of the fellows or persons stiled or reputed as fellows, or where there are no fellows or persons reputed as fellows, to a moiety of the students on the foundation, not computing advowsons given for the better support of the headships of any of the said colleges in the number.

Lord Hardwicke's exposition of the purview of the Mortmain Act.

In the case before Lord Hardwicke, of the Attorney General *v.* Weymouth^r, his Lordship stated with great distinctness the purview of the statute. "It is insisted," said his Lordship, "that the true intention of the Act was, according to its title, to restrain the disposition of lands, whereby they became unalienable; and that this was the only intention of the Act. But I think the intention of the Act is taken up much too short; for the title is no part of the Act, and has often been determined not to be so, nor ought it to be taken into consideration in the construction of this Act; for originally there were no titles to the Acts, but only a petition and the king's answer; and the Judges thereupon drew up the Act into form,

^r Ambl. 20, and see the *Collectanea Juridica*, 433.

and then added the title ; and the title does not pass the same forms as the Act itself, but the speaker, after the Act is passed, mentions the title, and puts the question upon it : and therefore the meaning of this Act is not to be inferred from the title, but we must consider the Act itself. It first takes notice that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility ; and then it proceeds, that nevertheless this public mischief has greatly increased, by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons, to uses called charitable, to take place after their death, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities, which they paid no regard to in their life-time ; and therefore the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution, and this will render them equally unalienable : but the legislature blended the two inconveniences together : the act of languishing and dying persons and the disherison of heirs."

In this case of the Attorney General *v.* Lord Weymouth, the devise was of land to be sold, and the residue of the money after payment of debts, &c. was

Devise of lands to be sold, and the money to go to a charity, within this act.

to go to a charity. And though such a devise does in contemplation of equity usually convert the real into personal property, yet as the statute had expressly provided not only that lands themselves should not be given to charitable uses, 'but that they should not be charged or incumbered for such purposes, a devise of lands to be sold and the money to be laid out in charitable uses, was considered as within *both* prohibitions, for here the lands were devised expressly for the ultimate object of a charity, and furthermore these lands were charged for a charitable use. It was to be considered too, that it was a gift of the rents and profits till a sale, and how long such sale might be postponed nobody knew ; for no man had a right to compel the trustees to sell, if they paid the debts and legacies, but the charity ; so that being a devise of the rents and profits it was in effect a devise of the lands themselves. And as to the devise of the money arising from the sale, it was not thought necessary to the determination of the question upon the statute, to say whether it should be considered as a devise of the land or of money. If the Act were not in the way, the persons intitled to the residue might come and pray to have the land in that Court instead of the money, and might have retained it as land ; and as the testator had given them the profits till sale, he had made them owners in equity of the estates. But it was not necessary to rely upon these grounds, since, whether the thing devised were considered as land or money, for the reasons abovementioned the devise was void. And the Chancellor took a distinction between the statute

of 11 and 12 W. 3. against papists, which laid the disability upon the person taking, (so that upon that statute when the party came to take he might have it as money,) and the statute in question, by which the disability was laid upon the person devising.

So likewise although a mortgage is considered as personal estate in equity, and a term of years is personal both at law and in equity, yet a devise of such subjects for a charitable use is not good within this statute, the words being, that the lands shall not be conveyed or settled *for any estate or interest whatsoever, or any ways charged or incumbered in trust or for the benefit of any charitable use*^a. So neither can money secured upon tolls or by assignment of poor rates or county rates, pass under a bequest to a charity, for they all come out of the realty^b, and the same doctrine has prevailed in respect to a lease under the Crown of the right to lay mooring chains in the river Thames^c.

Mortgages, terms of years, and money secured on tolls or rates, not devisable in mortmain.

Money given to be laid out in lands is within the words of the Act; but where a bequest was made to charitable uses to be secured by the purchase of lands of inheritance *or otherwise*, it was determined that such devise was good by force of the words *or otherwise*. For if a devise in a will is in the disjunctive and leave to the executors two methods of

Money given to be laid out in lands, within the words of the act. Exceptions.

^a 2 Vez. 44. Att. Gen. v. Meyrick. Ambl. 155. Att. Gen. v. Graves.

^b 10 Vez. Jun. 41. French v. Squire.

^c Ambl. 367. Negus v. Coulson.

doing a particular thing, the one lawful and the other prohibited by law, the Court cannot say, that because one method is unlawful, the other is so too, and therefore the whole bequest is void. If one is lawful that *must* be pursued and take effect. And though some stress at the bar was laid upon the words in the will directing the benefit to be *for ever*, yet the Lord Chancellor would not allow any weight to the objection; and he mentioned that there might be annuities not payable out of land that might have probable continuance in perpetuum, as Sir Thomas White's charity, which was a disposition of money to be employed in continual rotation in loans of several sums to poor tradesmen for stated periods, and any man might by will give a perpetual charity in this manner at this day. And the words heirs and assigns import no necessity for a purchase of lands; upon which part of the argument his Lordship said he would suppose that an obligor bound himself, his heirs, executors, and administrators, in a sum of money to a Papist, who obtained judgment on the bond and took out an *elegit*, in such case it had been held at the assizes that the Papist could not maintain ejectment, and yet the bond was good to bind the person of the obligor and his representatives, but not to charge his lands, or his heirs who represented him, in his landed capacity.

Money bequeathed to the corporation of Queen Anne's bounty, because, by the 16th rule of that corporation, it is to be placed out in the public

funds till laid out in proper purchases of *lands*, was in one case held within the Act^v. But in *Grayson v. Atkinson*^z, where a testator gave 40*l.* to be applied towards procuring Queen Anne's bounty; and till that could be obtained the interest of the same was to go towards augmenting the curate's salary; though the rule of the commissioners of the bounty was, that if any body will give 200*l.*, they will add 200*l.* more, the whole to be laid out in land; Lord Hardwicke thought it hard to extend the statute of mortmain to that case; and as the testator had not expressly directed the money to be laid out in land, he would consider it as a legacy of money, and direct it to be laid out in the funds; which, he said, would not prevent the end designed of procuring the Queen's bounty; for the commissioners might, nevertheless, lay out their proportion of the augmentation money in land. The secretary to the commissioners having reported that though the rule was as above stated, yet there was another rule or bye-law—that the donations of testators should have effect.

Upon similar principles to those which governed in the last mentioned cases, it has been determined (3)

^v *Ambler*, 687. *Widmore v. Woodroffe*.

^z 2 *Vez.* 454.

(3) *Grimmett v. Grimmett*, *Ambl.* 210. *Collectanea Juridica*, 1 Vol. 454. But in the case of *Grieves v. Case*, 4 *Bro. C. C.* 67. *Ashhurst and Eyre*, Lords Commissioners held that a direction to

that, where a man devised money to a charity, and directed it to be laid out in the public funds, till the whole could be laid out in lands to the satisfaction of his trustees, such devise was not within the statute under consideration: for though, if a person directed money to be laid out in lands to a charitable use, it would be void, yet in this case the Court would order the money to be placed in the funds till the purchase was made: and so also where a man gave it in such a manner as that the land to be purchased was the final end of the thing given, yet where there was sufficient room for the Court to say there was a discretionary power in the trustees to lay out the money one way or another, either in the funds or in lands, such devise ought to be held good upon the same principle on which the case of *Soresby v. Hollins* was decided. Here the direction was to lay out the money in the funds until it could be laid out in lands to the satisfaction of the trustees. When could that be? Not while the statute of 9 Geo. 2. was in force. To do so would be to act in opposition to their trust. And in a late case in the King's Bench where there was a devise to trustees, of land to be applied by them and their successors, and the ministers for the time being of a Methodist congregation, as they should from time to time think fit; it

place money *at interest*, until an eligible purchase of land could be made, was holden to be within the statute. And they observed that *Grimmett v. Grimmett*, turned upon a very nice criticism of the expression.

was clearly held not within the statute, and that the trustees might recover at law, however the Court of Chancery might afterwards direct the application of the fund^r.

To support that which at the time of the will was in mortmain, having been originally given before the statute, is held to be a legitimate object of a will; as where a bequest was made of 200*l.* to repair a free chapel^a; but ground cannot be purchased for the purpose of erection^a. It has also been decided that where previous to the statute a testator devised the whole profits of an estate to a charity, if the rents at any time after the statute should be increased, they must go to the increase of the charity^b.

A devise for the support or repair of what is already in mortmain, good.

But in a case^c where money was given to build a church where a chapel stood, and the Bishop dissented, the same favouring maxims which seem to have prevailed in many other cases where the object has failed, were not adopted by Sir Lloyd Kenyon, Master of the Rolls, who refused to apply the money towards repairing, or otherwise, saying that the intention must be implicitly followed, or nothing could

^r 6 East, 328, Doe on dem. Toone and West v. Copestake.

^a Ambl. 651, Harris v. Barnes, same v. Nash.

^a Ambl. 751. Att. Gen. v. Hyde. 3 Bro. C. C. 588.

^b Ambl. 190, Att. Gen. v. Johnson. Ambl. 201. Same v. Sparks, and see 7 Vez. Jun. 340.

^c 1 Bro. C. C. 444. Att. Gen. v. Bishop of Oxford. See also 2 Bro. C. C. 428.

Assets not marshalled in favour of a charity.

be done. And in the case of *Mog v. the President of Bath Hospital*^d, though Lord Hardwicke said, that since the statute of mortmain, 9. Geo. 2. c. 36. he had endeavoured to give charitable legacies effect as far as he could (4); yet he would not set up new rules to avoid that statute. And his Lordship refused to marshal assets in favour of a charity, or in other words, to throw the debts and legacies on the real estate, in order that the personal estate might be applied to the charitable use^e. And though in the *Attorney General v. Caldwell*^f, where a testator willed the residue of his personal estate consisting of his effects, annuities, *mortgages*, bonds, and notes, to be sold, and the produce given to a charity, the devise of the mortgages being void, the court ordered them, as being part of the residue only, to be first applied in payment of debts, so as to leave a larger fund for the charity, yet Sir Lloyd Kenyon, in a subsequent case^g declared he could not recognize the distinction between a specific gift of a mort-

^d 2 Vez. 52.

^e 2 Vez. 52. Ambl. 614. ^f 4 Bro. C. C. 153. ^f Ambl. 635.

^g 3 Bro. C. C. 373. Att. Gen. v. Earl of Winchelsea.

(4) Where a sum of money was left towards establishing a school, Lord Loughborough thought that though under this disposition he could not direct any part to be laid out in land or building, yet the master might teach in his own house or in the church. And he ordered a scheme to be laid before the Master in Chancery, which would not include the application of any part of the dividends to the purchase or renting of land. 4 Bro. C. C. 526. Att. Gen. v. Williams.

gage, and a gift of a residue in which it is comprized. In both cases it was an interest in land which could not pass by the statute, but must go in favour of the parties legally intitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit, to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage pro rata, and the residue of the mortgages to go to the next of kin.

It never has been doubted since the statute of Geo. 2. that a plain direction in a will to purchase land for a charitable use is void by the statute. But a bequest of money to be laid out in repairing what was already in mortmain, or even in building upon land already consecrated and appropriated, as in or towards re-building a church or a parsonage-house, has been determined to be clear of the statute above-mentioned^a. And it seems that if a bequest of money be made, to be disposed of to a charitable use, leaving the mode of disposition undefined, there is nothing in the statute to restrain the trustees from laying out the money in the purchase of land, since by the 2nd section of the last-mentioned statute, purchases for valuable consideration are expressly saved. But if there is occasion for coming into a Court of Equity for direction, that Court will not direct a purchase of land. Lord Hardwicke's opinion,

Where the mode of disposition is undefined, it seems a purchase may be made for value by the trustees.

^a 2 Vez. 189. 1 Bro. C. C. 444. *N. Brodie v. the Duke of Chandos.*

as expressed by him in the case of *Vaughan v. Farrer*¹, was, that a bequest of money for erecting a hospital or school, was not within the mortmain Act; because it did not necessarily follow that any new purchase of land should be made for the purpose which might have been equally well accomplished by building upon land already in mortmain, or by a gift of land, or by hiring a house. In another case² it was said that such a bequest to erect a school was good if any piece of ground already in mortmain, or as a mere gift from private generosity, could be procured. But in a subsequent case³ where the circumstance of there actually being a piece of land in mortmain in the parish where the charity was to be erected was much insisted upon, Lord Apsley, Chancellor, said, that directions in a will to erect a school-house in general imports an intention to purchase. And though it appears that there is a vacant piece of ground in the parish, the will does not point at that piece of ground. It does not say to repair or build a school-house on that piece of ground. And his Lordship dismissed the information.

Other cases have been equally opposed to *Vaughan v. Farrer*, and the *Attorney General v. Bowles*. And the doctrine seems now to be settled that a bequest

¹ 2 Vez. 187. ² 2 Vez. Jun. 547. *Att. Gen. v. Bowles*.

³ *Ambler*, 751, *Att. Gen. v. Hyde*.

to *erect*^m a charitable foundation imports *prima facie*, that land is to be bought, unless the testator by his will manifests his purpose that it is to be otherwise procured, or expressly adverts to land already in mortmainⁿ. The case of *Chapman v. Brown*^o, in which there was a trust for building or purchasing a chapel, where it might appear to the executors to be most wanted, and if any overplus, it was to go to a faithful gospel minister, not exceeding 20*l.* per annum, and if any further surplus, for such charitable uses as the executors should think proper; though standing by itself, a bequest of a residue to such charitable purposes as the executors should think proper was a good bequest, yet the whole trust was declared void: for the bequest to purchase was clearly void by the words of the Act; the trust to *build* had been also established to be within the Act; that bequest therefore fell to the ground: then the bequest on behalf of the minister, as being clearly intended for a minister of the chapel so directed to be built, could not stand as the thing failed with which it was inseparably connected^p. And lastly, although standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper is a good bequest; and

A bequest to
erect imports a
purchase.

^m Lord Hardwicke seemed to think that to *erect* might be taken as meaning to found or endow.

ⁿ 8 Vez. Junr. 191. Att. Gen. v. Parsons; and see 8 Bro. C. C. 588.

^o 6 Vez. Jun. 191.

^p 1 Vez. 534. Att. Gen. v. Whorwood. See 10 Vez. Jun. 534.

supposing it had been legal to bestow the money as testatrix had directed in the two first instances, after such purposes had been answered, there would have been a good bequest of this residue, yet as the prior bequest had failed which was to constitute this residue, and as it was impossible to ascertain how much would have been employed in building the chapel, and no direction could be framed for the master to proceed upon on a reference to him, the testatrix having given no ground for inferring what kind of chapel was intended, this ulterior bequest was held to be void for uncertainty; and the real estate was decreed to the heir at law, and the personal to the next of kin (5).

How general charitable bequests, without any specification of the objects, are to be effected.

And what the legal notion is of charitable purposes.

Where property is left generally in trust for charitable uses without defining them, the Court of Chancery will uphold such a trust as a valid bequest, but then the application either by the trustees, or the Crown, must be to purposes expressed in the statute 43 El. c. 9. or purposes analogous. If the charitable purposes are defined in the will, they must

(5) The trust of an annuity for a charity charged upon a devised estate being held void under this statute, it was ruled that the annuity did not pass by the residuary disposition, but sunk for the benefit of the specific devisees, 12 Vez. Jun. 497. But note, there was an express exception out of the residue of what he had before disposed of.

be such as the law recognizes as charitable purposes. But a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, cannot be supported as a charitable legacy, but would be void for uncertainty. Liberality and benevolence do not correspond with the legal notion of charity, and not coming within the compass of that term do not attract the same indulgence with which general charitable bequests have been treated by the court. And therefore, in the case of *Morice v. the Bishop of Durham*, where the bequest was in these terms, it was decreed a trust for the next of kin. For it was clear that a trust was intended, and wherever that is the case, and the trust is ineffectually created, or fails, the next of kin becomes entitled; but if no positive trust is intended to be created, but the devise leaves a discretion in the devisee to make the application or not, it is then considered as an absolute gift; for then the particular application pointed at is an act referred to the will of the devisee, and not imposed as an obligation by the testament. And though words of recommendation and desire may impose a trust and be considered as imperative, yet that can only be where the objects are certain.

Discretionary trusts, express trusts, and words of recommendation and desire—how considered in equity.

In a word, the indefinite nature and quantum of the subject, and the indefinite nature of the

objects, are always used by the court as evidence, that the mind of the testator was not to create a trust.

I shall conclude this subject with noticing three important points in respect to the clause in the statute concerning colleges, determined by Lord Keeper Henley*, viz. that a devise, not to the whole body corporate, but for the benefit of particular fellows, is good within the exception. That a devise to colleges as trustees for other charitable uses, is void by the statute. And that the exception extends only to colleges already established when the statute of mortmain was enacted.

PART XIX.

Appointment of Guardians by Will.

THE principal object of the statute 4 and 5 Philip and Mary was to prevent the practice of taking away or marrying maidens under 16, against the consent of their parents, but as Mr. Hargrave (1)

* 1 Sir W. Blackst. 90, Case of Christ's College, Cambridge.

(1) See Hargr. Co. Litt. 89, a. (14). The reader is referred

has observed, the statute prohibited it in terms which implied that the custody and education of such females should belong to the father and mother, *or the person appointed by the former*. But this statute applied only to the case of *female* children. The object of giving to the father this appointment, was more generally provided for by the statute 12 Car. 2, c. 24, sect. 8, 9, which enacts, that "where any person shall have any child or children under the age of 21 years, and not married at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in ventre sa mere, or whether such father be within the age of 21 years or at full age, by his deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the

to the notes of this gentleman on the Commentary upon Littleton, for a most able and instructive investigation of the learning respecting the several sorts of guardianship known to our law. Having looked into his notes for the information necessary to enable me to introduce the subject of testamentary guardianship with some discussion of the subject of guardianship in general, I found that I could not add any thing of my own to the valuable compendium of the doctrine which this profound and laborious annotator has already furnished to the profession, and therefore gave up the intention, thinking it unnecessary to introduce in a new work the substance of what is to be found in an existing publication which must be presumed to be in the library of every lawyer.

custody and tuition of such child or children, during such time as he or they shall respectively remain under the age of 21 years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants: and such person to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward or trespass against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same, in the same action for the use and benefit of such child. And such person to whom the custody of such child shall be so disposed or devised, may take into his custody to the use of such child, the profits of all lands, tenements, and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child till his or her age of 21 years, or any less time, according to such disposition aforesaid, and may bring such actions in relation thereto, as by law a guardian in common soccage may do.

Guardians at
com non law
and by custom.

Before entering upon the consideration of this statute of Charles, it seems proper to premise a few observations on the guardianships at common law and by custom. By the custom of the province of York (which custom the statute of 12 Car. 2, being general, does of course controul wherever they are in opposition) the father, by his last will and testament, might for a time commit the tuition of his

child and the custody of his person; which testament and appointment was to be confirmed by the ordinary, who was to carry the same into execution. And upon the omission of the father to exercise his power, the mother might, after his death, make a similar appointment. And as the statute confines the power of appointing a testamentary guardian to the father only, the custom still operates within its local extent, to give an authority to the mother in respect to the personal estate (to which only the custom extends) which she would not possess by virtue of the statute. The statute of Charles the second has no negative words to restrain the custom in this respect.

By the same statute whereby the father's power of appointing a guardian of his children by will was created, the tenure by knight's service, out of which the guardianship by chivalry arose, was abolished, and with it fell to the ground this dominion of lords over the heirs of their tenants, which was as inconsistent with the rights and duties of nature, as the principles of rational and liberal policy. For this guardian was not accountable for the profits made of the infant's land during the wardship, and though he is said to have been subject to the duty of maintaining the infant, it does not well appear by what means he was to be compelled so to do, in a manner agreeable to the fortune and rank of such infant. This guardianship existed rather for the interest and profit of the guardian, than as a trust for the benefit of the ward,

and was saleable, transferable, and transmissible like any other property.

The other descriptions of guardianship by nature—by nurture—and that arising out of soccage tenure, still subsist, though very little is now heard of them in our courts, since this office is usually assigned under the statute abovementioned; and where that is neglected to be done, the jurisdiction of the Lord Chancellor, now established, though of dubious and obscure origin, is generally resorted to. These three last-mentioned kinds of guardianship are all exercised with a responsibility for the profits of the estate. If an estate were left to an infant, his parent, by the common law, may be his guardian by nature. And even while the tenure by knight's service continued, the father, claiming this guardianship by nature, was entitled to the custody of the infant's *person*, even against the lord in chivalry, which was a privilege not given by the law to the mother when happening to be guardian by nature, as she might in some cases be. The father and mother may also be the guardians by nurture, where that species of guardianship is let in by the want of any other superior claims, for it only takes place where the infant is without any other guardian. This extends no further than to the custody and government of the infant's person, and determines at 14 in both males and females; when, if no other guardian is appointed by the choice of the infant or otherwise, the interval between 14 and 21 seems to fall under

the guardianship by nature; as appears likewise to be the case after the guardianship by soccage expires, which is also at 14 in both males and females.

The guardianship in soccage can only take place on a descent like the guardianship by chivalry, and arises only where the infant is seised of lands, or other hereditaments lying in tenure. The title to it is in such only of the infant's next of blood as cannot be inheritor's, according to the laws of descent in real property, to the soccage estate, and is not restricted to the whole blood. And the quality which principally distinguishes this guardianship from the guardianship in chivalry is, that it is a personal trust wholly for the benefit and interest of the infant. The power of this guardian over personal estate has been doubted, but the learned annotator on the treatise of equity has observed, that the custody of the person should seem to draw after it the custody of every description of property for which the law has not otherwise provided. Which idea, he adds, receives countenance from the instance of copyholds and inheritances not lying in tenure, being placed by the law in the hands of this guardian; and he further remarks that this opinion is strongly confirmed by the manner in which the 12 Car. 2, c. 24, regulates the powers of the guardian which it enables a father to appoint, for that statute authorizes such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments, and provides that he may

bring such action or actions in relation thereto, as by law a guardian in common soccage might do^a. Yet, says the same learned gentleman, there is an expression of Lord Chief Justice Vaughan^b which conveys, or seems to convey, a different opinion; for, speaking of the guardian under the statute 12 Car. 2, he says, "this new guardian hath the custody not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in soccage had not." But this guardianship, as all others which might otherwise take place at the death of the father, is superseded by the exercise by him of his power given him by the statute 12 Car. 2, c. 24, which professedly proceeds upon the model of the guardianship by soccage.

Testamentary
appointment.

Under this statute it is clear upon the words that none but the father can appoint, and it is held equally clear from the sense, that the guardian appointed by him cannot appoint another guardian, for it is a personal trust, and not assignable^c.

The power as to its objects is held to be confined to *legitimate* children, (in which are included those in *ventre sa mere*,) and by the words of the statute these must be under 21, and unmarried at the decease of the father. It extends not to illegitimate children, though such if females have

^a Fonbl. Treat. Eq. 3d Ed. p. 242.

^b Vaugh. 186.

^c See Vaugh. 179. *Bedell v. Constable*.

been held to be within the statute of Philip and Mary (2).

If the will is merely made for naming a guardian under this statute, and for no other purpose, such will need not be proved in the spiritual court; for as in such case the appointment takes effect solely by force of the statute, the temporal courts are the proper judges thereof^d. But if the will contains also dispositions of the personalty, it seems that the whole will must be proved, which probate will be effectual so far as the personalty is concerned, but of no avail in respect to the appointment of guardian. And it seems to be immaterial by what words the appointment is signified, so as the meaning sufficiently appears^e.

Probate not necessary to the validity of the appointment under the statute.

If the father exercises his power of appointment under the statute by deed, as he may, yet it has been held that such disposition by deed may be revoked by will^f. But no appointment can be revoked by a subsequent testamentary appointment, unless it be executed according to the

Appointment made by deed.

And such appointment is revocable by will.

^d 1 Vent. 207. Lady Chester's Case. ^e Swinb. p. 3, c. 12.

^f Finche's rep. 323. Lord Shaftsbury v. Hannam.

(2) See *Strange*, 1162. *Rex v. Corneforth*. But the court will, unless there is some objection, adopt the nomination of the father. 2 Bro. C.C. 583. *Ward v. St. Paul*, and note. So it seems also if the appointment is not made agreeably to the statute. *Dick*, 527. *May v. May*.

But such will
must be execut-
ed as the statute
directs.

statute, or directly import to be a revocation, which has been determined in analogy to the cases on this part of the statute of frauds^s.

Infancy of the
parties.

If the appointment has been made, the guardianship shall not be determined by the marriage of the infant before 21, for the statute declares that such guardianship shall continue during the time that he shall remain under 21. The father, though under age himself, may appoint by virtue of this statute, and though he could not devise the land in trust for the infant directly, yet the land will follow as an incident by law attending upon the custody of the heir^h.

Remedies.

The guardian when regularly appointed under this statute takes place of all other guardians, and may have a writ of ravishment of ward if the infant be taken from him, as the guardian by knight's service, or by soccage, might have had the same at common law, and shall recover damages as for the ward's benefit^f.

This guardian being constituted upon the model of the soccage guardian, and coming in the place of the father, has an interest joined with his trust, though not an interest for himself^k. But though it was

^s Vid: post. revocations of wills. Chap. 2, part 1.

Vaughan, 187.

See the case of *Mr. J. Eyre v. the Countess of Shaftesbury*,
2 P. Wms. 103.

^k Vaughan, 181. 2 P. Wms. 122.

agreed in the case of *Parry v. Hodgson*¹, that a testamentary guardian by the statute, until the infant was 21 years, had the same interest as a guardian in soccage till the infant was 14; yet it was holden that a testamentary guardian could not make a lease of the infant's land, but that such lease was absolutely void.

It seems he may pay out of the rents and profits the interest of any real incumbrance, and even the principal of a mortgage^m, but it has been held that he is not compellable to apply the profits of the infant's estate to pay off the bond debts of the ancestorⁿ. Nor can he, without the direction of the court, convert the real into personal or the personal into real estate^o. He is subject to an action of account as soon as his guardianship is at an end, but not before, for the rule of the common law is that an action of account does not lie while the guardianship continues. However, in equity, the infant may, by *prochein ami*, sue his guardian for an account during the minority. That court, it is said, often gives extrajudicial directions for an infant, and hears a person as *amicus curiæ*. And it was observed, by Lord Hardwicke, that in Lord Macclesfield's time, in the case of Lord Dudley, a stranger came and complained of the abuse of the infant's estate by the guardian; and upon this application, and his

Powers of a
testate
guardian.

¹ 2 Wils. 129. 135.

^m Prec. in Ch. 137.

ⁿ 2 Vern. 606.

^o 1 Vern. 403. 435.

undertaking to pay the costs, the court directed the master to examine the receiver's accounts, and see whether the infant was wronged or not^p. By the statute 4 Anne, c. 16, actions of account may be brought against the executors or administrators of guardians. But a guardian is entitled to all his reasonable costs and expences; and, therefore, he ought not to be charged as receiver, because then it seems he would lose these costs and expences, but as guardian, by name, for these it is said are in general allowed only to guardians or bailiffs, as such, and not to mere receivers^q.

PART XX.

Statute of fraudulent Devises.

A DEBTOR by specialties might, by devising his lands, have deprived his specialty creditors of all remedy against this part of his property, until the statute 3 and 4 William and Mary c. 14. was passed. But by this statute, "reciting that it was not reasonable

^p 2 Vez. 484. Earl of Pomfret v. Lord Windsor. 2 P. Wms. 119. 3 Atk. 625.

^q 1 Freem. 178. 1 Leo. 219. and see the statute 4 Anne, c. 16. sec. 27.

or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, it was enacted that all wills and testaments, limitations, dispositions, and appointments of or concerning any manors, messuages, lands, tenements, and hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his or her decease, should be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, should be deemed and taken only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, administrators, and assigns, and every of them, to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect."

And by section 3, "for the means that such creditors may be enabled to recover their said debts," it was enacted, "that in the cases before-mentioned, every such creditor or creditors should and might have and maintain his, her, or their action of debt upon his, her, or their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees jointly, and such devisee or devisees should be liable and chargeable for a false plea by him or them pleaded, or for not confessing the lands or tenements to him descended."

And by section 4 it was enacted, "that where there should be any limitation or appointment, devise or disposition, of or concerning any manors, &c. for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person other than the heir at law, according to or in pursuance of any marriage contract, or agreement in writing, bona fide made before such marriage, the same and every of them should be in full force; and the same manors, &c. should be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, should be raised, paid, and satisfied."

And lastly it was enacted, "that all and every devisee and devisees made liable by that act, should be liable and chargeable in the same manner as the heir at law, by force of that act, notwithstanding the lands, tenements, and hereditaments to him or them devised should be aliened before the action brought."

This statute, in respect to this part of its provisions, may be considered as suppletory to that of

the 13 Elizabeth, c. 5, against fraudulent conveyances, and as designed to extend the remedy to fraudulent devises.

It has been determined that an action of covenant does not come within the remedy given by this statute, which is confined to cases of debt, for though the word specialties is used as well as bonds, yet when the means of recovery are provided, the intention of the statute is plainly confined to debts, and those specialties on which an action of debt lies. The statute speaks throughout of debts, and a breach of covenant cannot be considered as a debt. The statute prescribes the means by which such creditors shall recover their debts, and in prescribing those means it only gives the action of debt^a.

This Act contains, as appears from what has been above recited, a clause saving the effect of such devises and dispositions as are for the payment of debts, which clause has been held to operate simply as an exception, leaving the case of a devise for the above purpose, as well as provisions of portions for children in pursuance of marriage contracts, entirely unaffected, and open to the same remedy and resort as before the statute^b. Since at common law there was no remedy against a devisee for payment of debts, such a case always was and still continues to

Excepting
clause; its ef-
fect.

^a 7 East 128, *Wilson v. Knubley*.

^b 2 Atk. 292, *Plunket v. Penon*.

be, since the statute, the subject of equitable jurisdiction, and accordingly the assets are equitably distributable, that is, equally and *pari passu* amongst all the creditors, whether by specialty or simple contract,

A devise for payment of debts out of the rents and profits only, has been clearly held within the exception^c. And it appears to have been the opinion of Lord C. J. Willes, that by virtue of the above-mentioned clause, a devise for the payment of any particular debt upon simple contract is a good devise against bond creditors^d.

But it is to be observed, that if a devise for payment of debts does not provide for it in a practicable manner, the case is not within the exception^e. But since the case of *Bailey v. Ekins*^f, the rule appears to be settled, that if the provision made by the will for the payment of debts be effectual, either at law or *in equity*, the case is taken out of the statute: so that if the will, instead of breaking the descent by a regular devise, only charges the estate with the debts of the testator, this provision is good and availing, notwithstanding the statute of fraudulent devises, and a court of

^c 2 Atk. 104. *Ridout v. Earl of Plymouth*.

^d Willes 524. *Gott v. Atkinson*.

^e 2 Brown, Ch. Rep. 614.

^f 7 Vez. Jun. 319, and see 8 Vez. Jun. 26, *Shephard v. Lutwidge*.

equity will act upon it; which is the same thing as to say that the interest so provided, and which equity draws out of the mass going to the heir, is distributable as equitable assets, among all the creditors equally, and without any regard to the precedence of specialty creditors. Lord Hardwicke in *Plunket v. Penson*^a, seemed to be of opinion, that it was necessary the descent should be broken to make the assets equitable; and that if the estate were suffered to descend charged to the heir, or if the heir were made the trustee (1), the descent being unbroken, the assets should be considered as legal assets; distinguishing such case from that of the devise of an estate to a stranger charged with the payment of debts which by breaking the descent would make the assets equitable^b. But Lord

Assets—equitable or legal.

^a 2 Atk. 290. ^b See 1 P. Wms. 430. *Freemoult v. Dedire*.

(1) A devise giving lands as the law would give it, in case there were no devise, is inoperative and void; and therefore if the legal estate be devised to the heir in trust, the descent of the legal estate is unbroken, and the devise has merely an equitable operation. See *Hedger v. Rowe*, 3 Lev. 127. But if the quality of the estate be altered, the descent is broken; as if the devise create a joint-tenancy or tenancy in common, where the descent would carry the estate in coparcenary. 3 Lev. 128. Hob. 30. But merely charging the estate does not break the descent. See 2 Lord Raym. *Reading v. Rawsterne*, 829. But if a mere trust estate descend it will be legal assets, since a trust estate descending is made assets by the statute of frauds. But, it seems, an equity of redemption of the fee, not being so converted by that statute, is considered as equitable assets. 2 Atk. 294. 3 P. Wms. 342.

Eldon, in the late case of *Ekins v. Bailey*, observed, that the rule cannot be accurate when it is stated that the descent ought to be broken.

If we suppose a devise to trustees in trust to pay debts, and all the trustees to die in the life-time of the testator, the estate must descend upon the heir, but it is clear the assets would be equitable. By the failure of the devise, the heir must have it, as the trustees would have had it, subject to the debts, and yet the descent is not broken (2).

Remedy at law
upon the statute.

The action, by the express direction of the statute,

(2) These devises are greatly promoted in equity. But though a devise of lands for payment of debts was formerly held to include those upon which the statute of limitations had run, 2 P. Wms. 373, and see 3 P. Wms. 89, Cowp. 548. 2 Vern. 141, *Gofton v. Mill*. Yet this general doctrine seems now to be controuled; and the distinction seems to be between those debts upon which the statute has already run in the testator's life, which are still to be presumed to be paid; and those upon which it has not run; which are not subject to be barred by its running after the death of the testator; for the trustee's neglect shall not prejudice the creditor. *Executors of Fergus v. Gore*, Ca. temp. Lord Redesdale, 107. Where debts are directed to be paid out of rents and profits, the court will, if necessary, decree a sale. 2 Vern. 26, *Berry v. Asham*. Though perhaps it is otherwise if out of the annual rents. 1 Vern. 104. So equity will supply the want of a surrender of a copyhold to the use of the will, if it is devised for payment of debts, as it will for a wife or children unprovided. 2 P. Wms. 490. 12 Vez. Jun. 216. The doctrine of election does not prevail against creditors taking benefit under a devise for payment of debts, and disputing the will in other respects, 12 Vez. Jun. *Kidney v. Coussmaker*.

must be brought against the heir and devisee jointly. And courts of equity hold themselves equally bound by the statute in this respect, and insist upon the heir's being made a party to the proceedings; for it is only by the act that the property becomes assets in hands of the devisee, and as that statute requires the heir to be a co-defendant, the remedy must be followed as it is prescribed, and a bill in equity is as an action at law. Perhaps, if the heir could not be found, the bill might charge that the plaintiff had made enquiry, and could not discover the heir¹.

If the heir happen to be made a joint devisee with others, then the action should be against the heir and devisees jointly, charging the heir both as heir and devisee. Supposing the estate be limited to several in succession by the devise, it seems proper to make them all defendants in respect of their estates; as where property is devised to go in strict settlement, making a tenant for a life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the tenant for life in tail; it would be prudent, if not absolutely necessary, to make the heir together with the tenant for life, the trustees to preserve, and the son or sons of the tenant for life, parties; and as the sons do not claim by descent, the parol could not demur.

¹ 1 P. Wms. 99. *Gawler v. Wade*. 2 Atk. 125. *Warren v. Stawell*. For the proper form of declaring against the heir and devisee jointly. See *Clift's Entries*, 243. pl. 19.

It is said, indeed, to be the general rule that where a devise is fraudulent under this statute, and heir thereby becomes subject to the action, together with the devisee, by virtue thereof, if such heir is an infant the parol cannot demur^k.

Of the estate
per auter vie
under this sta-
tute.

In respect to estates pur auter vie it should be observed, that as by the statute of frauds, 29 Car. 2, c. 3, sect. 12, an estate pur auter vie, which comes to the heir as special occupant, is made assets by descent, as in the case of lands in fee simple, and devisable by a will in writing signed by the devisor, and attested in his presence by three or more witnesses, so a devise of such an estate is also held to come within the statute of fraudulent devises, and to be void against specialty creditors^l.

^k See 1 Vez. 27. *Beaumont v. Thorp*, and as to the mode of pleading by the heir and devisee, see *Gott v. Atkinson*, Willes, 527.

^l See 3 Atk. 465, *Westfaling v. Westfaling*.

CHAP. II.

REVOCATION OF WILLS.

PART I.

Construction of Sect. 6. of the Statute of Frauds.

BEFORE the statute of 29 Car. 2. wills in writing of real estates might be revoked by parol ; and, indeed, after that statute, such power would still have existed, (as we may conclude in analogy to the doctrine of holding written agreements revokable by parol notwithstanding the 4th section,) if by the 6th and 22nd sections, special provisions had not been made to prevent it. Thus it is held in regard to the 12 Car. 2. c. 24. giving power to the father to appoint a guardian of his child, that the appointment under that statute may still be revoked by an instrument made *expressly* for that purpose without any attestation ; because no positive provision was made against it by that statute^a.

^a See 7 Vez. Jun. 376, 377, ex parte Ilchester. Ante, 239.

Much has been said on the difference in the penning of the 5th section of the statute respecting the execution of a will of lands, and of the succeeding section, which prescribes and restricts the methods of revocation. At the end of the case of *Right v. Price*^b, in Douglas's Reports, the learned Reporter has added a note, in which he has animadverted upon the difference in the language in the two clauses, which he attributes to inaccuracy in the composition of the Act; and it cannot be denied, that the variation in the terms, where the same principle must have governed, seems hardly explainable, but by imputing a mistake to the legislature. By the 5th section, the testator is not required *to sign in the presence of the subscribing witnesses*, but the subscribing witnesses are called upon to attest *in the presence of the testator*. And Mr. Douglas observes in the note alluded to, that he believes it is universally understood, that, to satisfy this 5th section, a testator must sign in the presence of the witness.

But by what has been above produced to the reader on this subject, it must have sufficiently appeared to him, that such actual signature, in the presence of the witnesses, is not held to be requisite, and that it is enough, if the testator acknowledges his handwriting to the signature, or publishes and declares it to be his will, when the witnesses subscribe their attestations.

By the clause respecting revocations, the subscription of the witnesses is not expressly directed, while, on the other hand, the signing by the testator in the presence of the witnesses, is positively prescribed. The clause runs as follows: "And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time, after the said four-and-twentieth day of June, be revocable, otherwise than by some other will, or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements, shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will, or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

It may reasonably be inferred to have been the intention of the legislature, to impose the same obligation as to the formalities of execution, on all wills properly so called, whether original or coming in the place of others antecedently made. The construction, therefore, which has been put upon the language of the revocation clause, has brought the two

Of the grammatical reading of the language of this section, whereby it is brought into agreement with the provisions of the preceding clause.

sections into equality in this respect, and thus imparted consistency and simplicity to the scheme of the statutory restrictions upon the execution of wills. In conformity to this plan of construction, as it had been judged a sufficient compliance with the requisitions of the *fifth clause*, if the testator *acknowledged* his signing, without *actually executing it in the presence of the witnesses*, it became important so to read the *sixth section*, which requires *signing in the presence of the witnesses*, as to bring it into agreement with the preceding section. The courts, therefore, have read the concluding words of the sixth section, *will, or codicil, or any other writing, signed in the presence of three witnesses*, so as to detach the words "will or codicil" from the succeeding words, "or any other writing," coupling these last words with the words which immediately follow, viz. "signed in the presence of three witnesses."

Of the legal distinctions founded upon this construction.

Thus they have applied the requisition of a "signing in the presence of three witnesses," to the *proximum antecedens* only, "or any other writing," and, again coupling the succeeding words "declaring the same" with the words immediately before it, have made therewith this complete sentence, "*or any other writing of the deviser, signed in the presence of three or four witnesses, declaring the same.*" At the same time the words "will or codicil" were understood to import a will or codicil executed and perfected according to the requisitions

of the foregoing section^c. Interpreting the language of the 6th clause, upon these principles of construction, the law which arises upon it is this; that a will or codicil, in order to revoke a former will, must be executed with the same solemnities as the original will, that is, it should be signed by the testator, or by his directions, and subscribed by three witnesses, in his presence. And if such subsequent writing, accompanied with all the formalities requisite to a perfect will of lands, under the 5th clause, make a fresh disposition of the property, inconsistent with the dispositions thereof by a former will, it is a plain revocation without any express declaration of intention to revoke. But if a writing, not duly attested according to the 5th section, contain an express declaration of intention to revoke, and furthermore, be actually signed in the presence of three or more witnesses, such instrument is an effectual revocation, and the witnesses need not, as in the case of a substantive disposing will, under the 5th section, subscribe their names to the instrument, in the presence of the testator.

^c Ellis v. Smith, 1 Vez. jun. 11. Hoyle v. Clarke, 218.

PART II.

Methods of Revocation (1).

THERE are two general heads under which all the smaller varieties on the subject of the revocation of wills may be included—revocations express, and revocations implied. A revocation may be said to be express, either when the testator, by a subsequent writing signed by him in the presence of three or more witnesses (2), declares a present intention (3)

(1) A man cannot make an irrevocable will, or bind himself so as to give up or take from himself this power of revocation. Swinb. p. 7. sect. 14.

(2) Though to revoke a will by an instrument of declaration according to the statute, such instrument must be signed in the presence of three witnesses, yet it has been held that it is enough if the witnesses sign, and it is not necessary that they should express in their attestation the fact of the signing by the testator in their presence, for their actual subscription is adopted only for the purpose of facilitating their recollection of the circumstance. 8 Vin. Abr. tit. Devise, 142. pl. 3. And indeed it has been said there is no absolute necessity for the witnesses to the testator's signing to subscribe at all. Vin. Abr. tit. Dev. (R) 4 pl. 3. *Townsend v. Pearce*, per Eyre and Parker J.

(3) Vid. post. that the expression of an executory or future intention to revoke, does not operate as a revocation.

to revoke, according to the construction above considered, whereby the latter part of the 6th clause is disconnected from the words 'will and codicil;' or secondly, by a will executed with the solemnities required by the 5th section of the statute, viz. by the signature of the testator, and the subscription of three witnesses *in his presence*: which latter mode may, it should seem, be properly considered as an express revocation, because, if a man after having made a will of lands, makes another will inconsistent with the former, and gives to it the form of a substantive independent instrument, he may be said to have explicitly and expressly revoked the preceding will, since he has himself declared that the will last made is his will, at the time actually present, and by consequence that it is to take place of every different disposition of an earlier date; or, thirdly, by cancelling, tearing, or obliterating such will by the testator himself, or by his direction or consent.

Under the 2nd general head may be classed, all those revocations which arise by the construction or inference of intention, which the law founds upon the collateral acts of a testator after making his will: and which are not within the reach of the statute of frauds.

It has been shewn, that according to the prevailing opinion, if an instrument be designed as a will, and is not made *merely* for the purpose of revoking a

former will of the same lands, it will not have that effect unless it be completed as the statute directs in respect to a will of lands, although it be signed in the presence of three witnesses^a; because, being intended as a will, and to revoke as such, it cannot revoke but as a will, and by virtue of that mode which in the first part of the 6th clause is pointed out. And indeed, where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke, or in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking.

A will, though rendered inoperative by extrinsic circumstances, may revoke a former will.

But although the doctrine seems now to be settled as it was laid down in the case of *Limbery v. Mason*^b, viz. that if a testator designs to revoke by a new will, unless the instrument be effectual to operate as a will, it shall not amount to a revocation. Yet the words "shall be effectual to operate as a will" must be taken, as has been before observed, with reference only to those requisites to its validity which have been made necessary to it by the 5th clause of the statute; since if properly executed and attested to pass freehold lands according to the statute, though

^a *Eggleston v. Speke*, Carth. 81.

^b *Com.* 454.

it should be prevented from operating by the incapacity of the devisee, or any other matter *dehors*^c the will, the former will is nevertheless revoked by it (5).

In the case of *Onions v. Tyrer*^d, the testator by his second will disposed of the same lands to the same purposes as by the former, though to different trustees; the first will was executed and attested according to the 5th section; the second will, though subscribed by the testator and attested by three witnesses, was not subscribed by those witnesses in the presence of the testator: it was therefore invalid as a will of lands, but was executed agreeably to one of the modes of making a valid revocation prescribed by the 6th section of the statute. In that case the Chancellor observed upon the circumstance of the dispositions in both instruments being the same (6), by which it was demon-

^c *Roper v. Radcliffe*, in dom. Proc. 1 Bro. P. C. 450. Vin. tit. Dev. (R 3) pl. 2. in Notis. ^d 1 P. Wms. 342.

(5) *Vez. jun. 370.* per Lord Alvanley, et vid. *Montague v. Jeffereys Moor*, 4 Roll. Abr. 615. so a will devising lands in fee to the heir at law, though void as to the purposes of a will, yet operates as a revocation if attested according to the statute, per Lord Hardwicke, in *Ellis v. Smith*, 1 Vez. jun. 17.

(6) See the decree containing the reasons on which it was founded, stated from the register in Mr. Coxe's note to the case.

strated that the testator did not mean to revoke the dispositions of the same lands made by his first will ; but his Lordship intimated that his judgment would not have been altered if the same lands had been given to *other* persons by the second will ; taking, as it is presumed, the broad ground, that a will of lands is not to be revoked by a subsequent will, unless such subsequent will is effectual *as a will* under the statute ; and the law seems now to be well settled, that though the dispositions of the second will be ever so inconsistent with those of the first, the first will shall stand unrevoked unless the second be signed by the testator, and also subscribed by three witnesses in his presence. The same consequence still holds though the second will contain an express revoking clause, and is also signed in the presence of three witnesses ; for the revocation is then considered as being made in subserviency to the disposing part of the will ; which being ineffectual, as not being subscribed by the witnesses in the testator's presence, the accessory must follow the fate of the principal. But where the revoking clause has not this connection with the disposing part of the will, as where the dispositions relate to other lands without affecting the subjects of the first will, or where the second will is only of personal estate, there seems to be no reason why, if it contain an express revoking clause and be signed by the testator in the presence of three witnesses, it should not revoke an antecedent will of lands ; and such seems to have

been the opinion of Lord Chancellor Cowper, in the above-mentioned case of *Onions v. Tyrer* (7).

PART III.

Inconsistent Wills.

IN respect to the operation of a subsequent will of lands, with the ceremonies prescribed by the 5th section, as a revocation of a preceding will, it is material to be observed, that such effect is not produced by the subsequent will, merely as being the *last* will, unless its dispositions of the property are incapable of standing with those of the preceding will: and where there is any such inconsistency, the revocation produced thereby is confined in its extent to the subjects of the inconsistent dispositions. This seems to be well established in *Hitchins v. Bassett*^a, where the case upon the special verdict was as follows:—Sir Henry Killigrew was seised in fee

^a 1 Show. 265. 2 Salk. 591.

(7) See the same doctrine and reasonings applied to the question of revocation upon the statute of 12 Car. 2. c. 24. 7 Vez. jun. 348. *ex parte Ilchester*.

of the lands in question, and on the 12th of November, 1644, made his will in writing, whereby, (amongst other hereditaments) he devised the premises to Mrs. Jane Berkely (his near kinswoman) for life, with remainder over to Henry Killigrew (testator's natural son) in tail, and made the said Mrs. Berkely sole executrix. They further found that afterwards, in 1645, the testator made another will in writing, but what was contained in the last mentioned will, or what was its purport and effect the jurors were ignorant. The argument for the heir at law, and in support of the last will as a total revocation of the first, rested mainly upon the construction of the maxim—that a man could not die with two wills; which the counsel on that side interpreted to mean, that if a man after having made a will of lands, makes and executes another will, calling it his last will and testament, and giving it the form and language of a substantive independent will, it must necessarily be a total revocation of the preceding will. It was admitted that a man might make several wills of particular subjects, but then they ought to be confined in expression to those particular subjects, for however different the subjects, yet if the subsequent will was published generally as a man's *last will and testament*, it must be held to be a revocation of the former will. It was also true that a testator might make as many codicils as he pleased, but there was a wide difference between wills and codicils, a codicil being an accessory to a will and not destructive, but con-

firmatory thereof. It was observed also, on the same side, that where a man makes several wills expressly of different particular things, these together make but one will, though written upon different papers. But that as the jury had found that the testator had made another will, this must be taken to mean a general testament; and it must be understood to mean a different will, for if it had been a duplicate to be sure it would not be a revocation, but then it ought to be *idem* and not *aliud testamentum*. And upon the whole they concluded, that if the testator did in fact make a second will, not correspondent in omnibus with the first, and purporting to be his *last will and testament*, it was necessarily a total revocation (1).

These arguments were answered on the other side by denying the construction put upon the civil law maxim, 'that a man can die with but one will.' They said, that the true construction of that maxim was, that where two devises of the same thing were made, the last must stand, but that two wills might well stand together as to such devises or bequests as are not inconsistent. That there was no ground for presuming that the last will in this case, though a complete will, contained any thing inconsistent with the devise in the first will, under which the lessor of

(1) The same line of argument was taken and pursued by the late Mr. Serjeant Hill in arguing the case of *Goodright v. Harwood*, Cowp. 89.

the plaintiff claimed. The Court (in Trinity term, 4 W. and M.) gave judgment for the plaintiff, and a writ of error being afterwards brought in Parliament, that judgment was affirmed. And since this case the point appears to have been considered as settled, that a second substantive independent will, properly executed, as a will of lands, is not, merely as such, a total revocation of a former will, but only so far as it is inconsistent with it; though it must be owned that Sir Matthew Hale, when he sat as Chief Baron in the Exchequer, seemed to be of opinion on the same case^b, that such subsequent independent will, though not importing in express terms a revocation of the former, nor passing any land, would amount in construction of law to a revocation(2). That great Judge, it is true, expressed himself in favour of the

^b Vide Hardress, 376. *Seymour et Ux. v. Rosworthy*,

(2) In arguing the case of *Hitchins v. Bassett*, it would seem as if Serjeant Maynard meant to concede that where the second will appears to have appointed an executor, it may be considered as that sort of distinct, substantive, independent will, which must revoke a former will in toto; but I find no authority for such a concession, and I conceive that the law is at this time clearly held otherwise. It was holden (before the statute of frauds) that if a man made his will, and devised his land to J. S. and afterwards purchased the manor of D. and afterwards wrote in his will that J. D. should be his executor, this was no new publication to make the lunds pass, Vin. tit. Devise (Z) S per Popham, C. J. And the principle in this respect is the same as to republication and revocation.

first will, but then it was on the ground of there being no finding by the jury of the contents of the second will, so that it did not appear but that the second will was a *confirmation* of the first.

The rule, however, is now established, that the contents of such second will must be found, and the contents so found must appear to be inconsistent with the dispositions of the former will, to operate as a revocation; and that if part is inconsistent and part is consistent, the first will shall only be revoked *pro tanto*, and to the extent of these discordant dispositions.

The case of *Hitchins v. Bassett* received confirmation from the subsequent case of *Goodright v. Harwood*^c, which passed through three stages of adjudication. The jury found by their special verdict that J. Lacy made two wills, both duly attested so as to pass freehold estates; and that the disposition made by the second will, which was eight years after the first, was different from the disposition in the prior will, but in what particulars was unknown to the Jurors: and the Jurors did not find that the testator cancelled the first will, or that the defendant destroyed the second. It was contended for the defendant in the writ of error, that the grounds of the decision in *Hitchins v. Bassett* were in his favour, for that case was decided against the effect of the second will as

^c 3 Wils. 497. Cowp. 87. 7 Bro. P. C. 344.

a revocation of the first, because there was no proof whatever of any change of intention in the testator, or even that the second will did any way affect or concern the testator's lands. But that in the present case it was found that the second will was attested by three witnesses, that it did relate to lands, and indeed to the very estate in question, because the testator had no other real estate. And that as it had been expressly found that the disposition of 1756 was different from the disposition in 1748, that finding amounted to a finding of an express revocation of the first will.

But Lord Mansfield, after stating the rule that a subsequent devise of land must be inconsistent with a prior devise of the same land, or the first will would stand as a good subsisting devise, observed that it was not found that the second will was in any particular repugnant to or inconsistent with the first. Had the defendant destroyed the second will there might have been good ground to presume such inconsistency or repugnance, and the jury might have found the fact of revocation. His Lordship added, that there was no variation in substance between this case and that of *Hitchins v. Bassett*. That, properly speaking, *another* will could not exist without there being a difference, for if it were exactly the same it would be no more than a duplicate or republication of the first will. That the Jury, therefore, in finding it to be another will, said, *ex vi termini*, that it was different; but as they had not found in what that

difference consisted, the Court could not presume that there was any inconsistency in the dispositions of the two wills, and by consequence they could not say that the first will was revoked.

This doctrine is in itself so rational, and so founded on authorities, that one is surprized at seeing the question renewed, and again disputed at so late a period; but even these cases did not prevent the point from coming again into discussion, with a trifling variation in the circumstances, about five years ago, in the case of *Thomas v. Evans*^d; in which, a person made his will, whereby he bequeathed his personal estate to his mother, and, after several intermediate limitations, devised the ultimate remainder to T. Upon his having afterwards acquired other estates, some by purchase and some by devise, and the bequest to his mother having lapsed by her death, the testator made a second will disposing by name of the property which had been so devised to him, and then added, "as to the rest of my real and personal estate I intend to dispose of it by a codicil hereafter to be made to this my will." This was determined to be no revocation of the former will. It was not necessary to suppose the words intimating the future intention to be meant to embrace the real property before devised, as the testator had acquired estates since the first will, which were not included in the second, and which might satisfy the words by which the future intention was expressed;

^d 2 East, 488.

Express intention to revoke no actual revocation.

but admitting these words to include the real property devised by the will, still it did not appear that the disposition intended to be made of it would be *inconsistent* with the former devise; and even supposing it to be intended to be inconsistent, yet an express *intention* to revoke would not operate as an actual revocation; for, as was truly observed at the bar and on the bench, what would not have been a revocation by parol before the statute would not be so since, though reduced into writing with all the formalities of the statute, and it had been decided that a bare intention to revoke though expressed by parol was no revocation before the statute, unless the testator declared that he did revoke his will (3).

Inconsistency between the will and subsequent acts.

As a second will is no revocation of the first, any further than as it is inconsistent therewith, so neither does a testator by acting in any other manner upon the property which he has already devised by his will,

(3) *Cranvel v. Saunders*, Cro. Jac. 497. where it was resolved by the court, that if a man makes his will, in writing, of land, and afterwards upon communication says, that "he has made his will, but it shall not stand," or "I will alter my will," these words are not any revocation of the will, being in a future sense, and only a declaration of what he *intends* to do. Aliter if he says I do revoke it or in any other manner declares his purpose to revoke it in presenti. But if a testator declare his intention by parol to revoke his will, and that upon his arriving at such a place he will execute his intention, and in his going thither he is murdered, it has been said that the intended revocation shall take place. 1 Roll. Abr. 614. 7 Vez. jun. 371.

revoke the will by such act beyond the extent of that necessary inference which is created by the inconsistency between the will and his subsequent conduct. Thus in an early case^e where a man, having issue two sons by several venters, devised his lands to F. his eldest son, in tail male, remainder to the heirs male of W. his younger son, and for default of issue to his own right heirs; and afterwards made a lease to W. for 30 years, to begin after his the testator's death, and died: it was resolved that this lease made to W. was not a revocation of the whole devise, but quoad the term only. And the same point was agreed to on the bench and at the bar, in *Montague v. Jeffrys*^f. But this doctrine is carried to its fullest extent in the case of *Lamb v. Parker*^g. There Edward Parker by his will devised to his younger son W. Parker a messuage for 99 years, if three lives therein mentioned lived so long, yielding and paying an annuity of 50*l.* to his sister, who was the plaintiff, for her life. The testator afterwards demised the same messuage to one L. for 99 years, if three lives, named in such demise, should so long live, yielding and paying 50*l.* per annum, to the testator, his heirs, and assigns. The question was whether this demise to L. was a revocation of the devise to W. and consequently of the annuity payable to the plaintiff.

The cause was first heard at the Rolls and then held to be a revocation; but upon appeal to the

^e Cro. Car. 23, *Hodgkinson v. Wood*. Ann. prim. Car. Reg.

^f Vin. tit. Dev. (u).

^g 2 Vern. 495.

Lord Keeper^a, the contrary was adjudged and upon the following grounds.—That by the lease to L. the term of 99 years commenced immediately in the life-time of the testator; whereas the term to W. was to commence from the testator's death; and though both were determinable for three lives, and possibly L.'s three lives might happen to live the longest, yet, that a reversionary interest passed which would carry the rent reserved on L.'s lease. The ground of this species of revocation is, as is above observed, the inconsistency of the posterious Act, and the inference of intention arising from such inconsistency.

Grant of a less interest, than was given by the will, to the same person.

Proceeding, therefore, upon this principle, a lease made subsequent to the will of the devised land, for the benefit of the same person to whom the fee had been devised, and to commence upon the decease of the testator, was in *Coke v. Bullock*¹, adjudged a revocation in toto. Had it been to a stranger, it was agreed, it would only have been a revocation pro tanto (4). And it was likewise agreed that if the lease had been granted to begin presently, or

To a stranger.

With a different commencement.

^a Sir Martin Wright.

¹ Cro Jac. 49.

(4) A distinction was here adverted to by Walmsley J. which is clearly not law, as the law is now settled, viz. that though in the case of a lease to a stranger after a will made, such lease, if it comprehend part only of the same lands, is only a revocation for such part; yet if it embrace the entire lands, though it is partial only in respect to the estate, it is a *total* revocation, as extending specifically over the whole subject matter.

futurely in the life-time of the devisor, it would have been no revocation, for then it might have stood with the will.

Upon this distinction in respect to the time of the commencement, the case of *Baxter v. Dyer*^{*}, determined by the present Chancellor is in accordance with the last-mentioned case of *Coke v. Bullock*. In *Baxter v. Dyer*, the testatrix, after devising lands to Sir John Dyer, and his heirs, borrowed from the devisee a sum of money, and mortgaged the devised estate to him, by a conveyance in fee, and upon the ground that mortgages are in equity considered not as conveyances of the estate, but as mere pledges thereof by way of security, this subsequent mortgage, *although it was made to the same person to whom the estate itself had been devised*, was held to be no revocation. As in *Coke v. Bullock* the lease was to begin in the life-time of the testator and might have terminated before his death, so in this case the pledge was to take place in the testatrix's life-time, while it was hers, and at her own disposal, and the object might have been answered in her life-time. It was therefore held to be no revocation. And the Chancellor, after stating that the case of *Harkness v. Bayley*¹, had been misreported, produced a note which he himself had made upon it, wherein a feature of inconsistency between the will and the posterious acts of the parties appeared, by attending

^{*} 5 Vez. jun. 656.

¹ Prec. in Chan. 514.

to which, the principle of that case might be reconciled with his decision of the case before him; for it appeared that after the mother's devise in fee to the daughter, the son joined the mother in a conveyance of the estate for 500 years to the daughter, with a proviso that if the mother or son should pay during the life of the mother 100 *l.* a year to the daughter, and the son after the mother's death should pay 4000 *l.* to his sister, then the term should cease and be void, and the son moreover covenanted with the sister to pay 4000 *l.* to his sister after the mother's death, and also with the mother to pay the annual 100 *l.* to his sister during the mother's life. This conveyance was clearly inconsistent with the devise, and it was also clear that the mother intended the estate to descend to the son.

The settled law therefore upon these cases is, that a will is not to be revoked but by necessary implication, so that where the subsequent will or posterious act is consistent with a prior will or with any part of it, such prior will remains valid in part or in all according to the extent to which the dispositions of the party can be effectuated without contradiction or discordancy. But where two inconsistent wills are produced of the same date, or both without date, neither of which can be proved to be last executed, they are both necessarily, and by the common law, void for uncertainty so far as they are inconsistent, and supposing no act of the testator subsequent to the wills to have explained and reconciled them, the heir at

Where there are two inconsistent wills of the same date, or both without date, they are both void for uncertainty.

law^m is let in. Though according to the case last cited in the margin, either will is subject to be confirmed by a subsequent act or declaration of the testator. Which judgment appears to stand on a very reasonable and intelligible principle. Since a will cannot be said to be revoked by a will till the death of the testator. And the act of the testator only operates to decide which is his *last* will and not to produce the effect of an implied or parol republication, of which, since the statute of frauds, there is authority and reason for doubting the possibility, as I shall endeavour to shew in its proper place.

PART IV.

Intention.

IT is manifest that these cases of inconsistent wills turn principally upon the intention of the testator; but we must observe that a will perfected as the statute requires is not subject to be overturned by loose and conjectural inferences of an alteration of mind in the testator. The cases have reduced the doctrine to a regular system. The statute itself has limited the mode whereby a will may be expressly

^m 5 Bro. P. C. 57, Phipps v. Earl of Anglesea. 7 Bac. Ab. 327.

revoked; and one of the modes prescribed by the statute is by a subsequent will, which, we have seen, should, to produce that effect according to the force given by construction to the word "will," where it occurs in the 6th section, be perfected with the formalities required by the preceding section. But this construction of the language of the 6th section seems to have given to it no enabling efficacy, in respect to the operation of a will, since if the words "will or codicil" had not been excepted out of the restraint put upon the power of revoking, it should seem that the statute must either have been construed not to extend to the case of a subsequent will; or to have enacted that a will once perfected, though made 20 years before the testator's death, must be taken as his last will, if remaining uncanceled, notwithstanding a subsequent will should be made within a month before the decease of the testator, with all the circumstances constituting a perfect will.

No intention can be inferred from a will of lands not executed according to the statute.

As the law now stands, it has been shewn, that a new substantive will, unless it be executed as the 5th section directs, will not revoke a former will; which rule seems to arise justly out of the principle of intention, for an intention to revoke a first will by a second can only be properly inferred from a legal, valid, and perfect disposition of the same property; which accords with the rule of the civil law, "*Tunc prius testamentum rumpitur cum posterius perfec-*

tum est(1).” In truth, since the statute of frauds, there can be no will in contemplation of law that has not been executed with the formalities made necessary by that statute. It is a mere nullity (2), affording no ground of inconsistency from which to infer even a change of intention. But in general an instrumental act of a testator, inconsistent with the dispositions of his prior will, even though such act may be rendered inoperative by the want of certain legal requisites to its validity, will effect a revocation. For though, in the case of a subsequent will, the courts will not take any notice of its existence as to any devise of land, if not duly executed and attested, yet in the other cases of invalid instrumental acts, they are respected as indications of intention though specifically inoperative. And, indeed, if a will devising land be executed and attested so as to have an existence as a will, though from circumstances extrinsic it is rendered void, it may still effect a revo-

But other legal acts, though instrumentally inoperative, may nevertheless revoke a will.

And if a will be properly executed, though from circumstances extrinsic it is prevented from operating, it may nevertheless operate to revoke a prior will.

(1) See the case of the Earl of Ilchester, 7 Vez. jun. 348. that a testamentary appointment of a guardian, by virtue of the 12 Ch. 2, c. 24, is not revoked by a subsequent testamentary appointment, which is not substantively perfected by the attestation of two witnesses, according to that statute.

(2) Equally so in all courts either of law or equity. Thus in equity, a will of lands, unattested according to the statute, and containing a bequest of personalty to the heir, will not put him to his election, which is a striking instance to shew the absolute nullity of such a devise in the view of the courts of equity.

cation, as in the case before mentioned of a will devising land in fee to the heir at law^a.

If a testator leaves at his death a dozen wills, and only one executed and attested so as to pass real estate, such will, whatever may be its date, is properly his *last* will as to this part of his property. And as a man can have no will but his *last* will, there can be no other *will* from which any intention of the testator, inconsistent with the dispositions of his operative will, can be inferred (3); but if a testator affects to do something instrumentally, which fails from the omission of some circumstances with which it ought to be accompanied, and which, if effectuated, would by its specific operation revoke a prior will, the courts will take notice of such imperfect instrument, and construe it a revocation as much as if it had been rendered effectual to its purpose. For it will not be supposed that a nugatory act was intended to be done, when that act was professedly to have immediate perfection: whereas in the case of an unexecuted will, which is made in prospect of death and with regard to a future condition of things, it is reasonable to suppose

^a Vid. *Ellis v. Smith*, 1 Vez. jun. 17. and note (2) in the preceding page.

(3) This is strongly put by Sir Wm. Grant in giving his opinion in the case *ex parte Ilchester*. "It is not competent for a person to express an intention, as to land, by such an instrument." 7 Vez. jun. 378.

it to be left purposely unfinished and inoperative, to be adopted or not on the approach of extremities, as the state of the testator's affairs and connections may at that season determine his inclinations.

Upon the above-mentioned principles, the imperfect conveyances by a deed of feoffment without livery of seizin, and by a deed of bargain and sale of the freehold without such inrolment as is required by the statute in that case provided^b, though specifically inoperative, are nevertheless effectual revocations. So, before the statute taking away attornment, a grant of a reversion without attornment was a revocation of an antecedent will devising the same property (4).

Imperfect instruments of conveyance.

Whether a deed intended ~~to~~ operate as an appointment of uses, but incapable of operating as a valid appointment, either from a deficiency of power in the party executing the deed, or a neglect of some ceremony made necessary to the efficacy of the appointment by the person granting the power, can be operative as a revocation, seems to be left, by the case of *Shove v. Pincke*^c, in a considerable

Power of appointment ill executed.

^b 1 Roll. Abr. 615. Vin. Dev. (P) pl. 6. Went. Off. Ex. 22. 3 Atk. 803. ^c 5 T. R. 124.

(4) Went. Off. Ex. 22. So where a tenant to the præcipe is made towards suffering a recovery, and no other proceedings are had, a previous will is nevertheless revoked. Vid. *Harmood v. Oglander*, 6 Vez. jun. 199.

degree of uncertainty. If we look to the judgment and certificate^d, it is plain that this point cannot be considered as judicially decided by this case. Lord Kenyon indeed observed, that even supposing the appointment made in that case to be an inadequate conveyance for the purpose for which it was intended, still if it demonstrated an intention to revoke the will, it amounted in law to a revocation(5). He added, that if it were necessary to decide the point, he did not see why it might not operate as a grant of the reversion. But although the late Chief Justice seemed clearly to be of opinion, that a void appointment would have the effect of revoking a prior disposition by will of the same property, such effect was not, as far as appears by the report, at all adverted to by the other judges, and in the certificate mention was only made of the operation of the deed as a grant of the reversion, or as a covenant to stand seised to uses(6).

The failure of the appointment in the case of

^d 5 T. R. 310.

(5) In the cases of feoffment without livery and bargain and sale without enrolment, the instrument itself is complete, and there is no intrinsic defect in it, but something subsequent is wanting to its specific operation. Between these cases therefore, and that of an appointment informally executed, or without authority, there is a difference; the informity in this latter case being in the instrument itself.

(6) See the observations made upon this case by Lord Alvanley, in the important case of the Earl of Ilchester. 7 Vez. jun. 374.

Shove v. Pincke arose from the defect of a power to make it, the power originally reserved having been exercised without a fresh reservation (7), but there does not appear to be any sound distinction between such a case and one wherein the failure happens by reason of an omission of any ceremony, made necessary by the person creating the power, to its valid execution. Supposing the revocation to be produced by inference of intention, it is plain that the failure, whether it arise from one cause or the other, affords an equal inference of intention (8).

It has been long a settled point, that a grant made to a person incapable of taking under it, may nevertheless operate as a revocation of a will. Thus, where a man^a, after having made his will in November, 1739, and thereby given all his real and personal estate to his brother, by a deed poll made in November, 1740, gave and granted to his wife all his substance which he then had, or thereafter might have, it was decreed that the grant was void, because the law would not permit a man to make a grant or conveyance to his wife in his life-time; neither would

Of grants to persons under disabilities.

^a 3 Atk. 72. *Beard v. Beard*.

(7) For this point see the leading case of *Heli v. Bond*, 1 Eq. Ca. Abr. 842.

(8) The instrument endeavoured to be set up in *Clymer v. Littler*, 3 Burr. 1244, had no definite legal character, or specific tendency, and was therefore insufficient to ground any inference of intention, besides that it laboured under a suspicion of forgery.

a court of equity suffer a wife to take the whole of a husband's estate beneficially, in his life-time, for it could not be in the nature of a provision, when it comprehended all the husband was entitled to. Yet as being an act inconsistent with and repugnant to the will, though not strictly legal, it amounted to a revocation. It produced, therefore, an intestacy as to the legacies: and though the appointment of the brother as executor remained unrevoked, yet the revocation of the legacies given to him made him a trustee in equity for the next of kin.

In the same manner a subsequent devise to a person incapable of taking under it is a revocation of a prior will; as was determined in the case of *Roper v. Radcliffe*^f, in the House of Lords, where lands were given, by the second will, to a papist. And the same effect has been adjudged to wills devising an estate to the poor of a parish^g, and to a corporation^h.

But in these cases of invalid instruments it does not seem to be so correct a construction of their operation, to ascribe their revoking efficacy to the indication they afford of an *intention to revoke*, as to the indication they afford of an intention to do

^f In dom. proc. 1 Bre. P. C. 450. 10 Mod. 233. 2 Abr. Eq. Ca. 771.

^g *French's case*, cited in *Montague's case*, Vin. tit. Dev. (O) 4. and 10 Mod. 94.

^h Vin. tit. Dev. (O) 5.

that which by a positive rule of law is an act of revocation (9). For unless the act is done so as to be effectual to its purpose would have the effect of revoking, an ineffectual attempt to do the act could not produce such a consequence; and, as it will appear hereafter, this effect of these acts themselves, when executed completely, cannot for the most part be satisfactorily explained on the principle of intention.

PART V.

Acts fraudulently done, or procured to be done.

Where a deed is void as being covenously made, it seems clearly held to be incapable of operating as a revocation, for it is a complete nullity. And, in a court of equity, a deed which has been obtained by fraud or by compulsion has, in a case before Lord Thurlow, been held equally inoperative against a subsisting will. His Lordship observed, that the

(9) Lord Hardwicke expresses this opinion in the case of *Hick v. Mors*, Ambl. 216, and *Abney v. Miller*, 2 Atk. 598, and again more pointedly in *Sparrow v. Hardcastle*, of which the reader will find an accurate note in 7 T. R. 416, where his Lordship says that "these imperfect conveyances are revocations, because they import an intention of altering the condition of the estate."

reason against admitting such an instrument to have the effect of a revocation was strong in that court, since when application is made by the proper party it will be ordered to be delivered up, and where a deed is ordered to be delivered up it is implicitly declared to be *no deed* (1).

The case just cited of *Hawes v. Wyatt* was first decided by the late Lord Alvanley, when Master of the Rolls, against the revoking effect of the deed, and his decision was reversed, upon appeal, by the late Lord Chancellor Thurlow. It appears, however, that Lord Alvanley, when, as Lord Chief Justice of the Common Pleas, he sat with the Chancellor in the case *ex parte Ilchester*^a, remained of his original opinion^b. He observed, that in that case the son, who was the testator, after the disposition, went abroad; that during his life he never intimated any intention to quarrel with it; that the bill was filed to set it aside upon such an exertion of parental authority, as, that that court would not permit an instrument so framed to stand; his Lordship allowed that the deed could not operate against the heirs of the son; yet "he was of opinion it would revoke the will, for the son thought it was actually revoked,

^a 7 Vez. jun. 348.

^b Ibid. 374.

(1) See the case of *Hawes v. Wyatt*, 3 Bro. C. C. 156. It seems also to be held in this court that a deed executed by mistake is also no revocation of a will, *vid.* 6 Vez. jun. 215, and see *post tit. 'mistake.'*

and that therefore to permit it, to stand would be against principle; that though Lord Thurlow differed from him, he believed *Hick v. Mors*^c was not adverted to, but that there was the authority of Lord Hardwicke that such an instrument was sufficient to revoke a will."

It does not however, in the only report of the case of *Hick v. Mors*, distinctly appear that any fraudulent means were taken to induce the testator to execute the revoking instrument. The words of the reporter are, "he was prevailed upon;" and to be sure the facts of the case induce a suspicion of improper influence. No fraudulent arts or undue influence, however, are stated to have been used, nor are any such distinctly alluded to by Lord Hardwicke, who refers the case to that class of cases above considered, where imperfect conveyances have been held to revoke antecedent wills. Stripped of any colouring of fraud, the case was simply this: A testator covenanted by indenture to levy a fine, and in the deed specified the use of the future fine to be to H. for 1000 years, which fine was accordingly levied; he afterwards made his will, properly attested, and devised the fee of the same premises to H. and in the year following executed a fresh covenant by indenture, reciting the first, declaring a new and different use of the fine, viz. to H. in fee; and whether by this the will was revoked was the question. But whether the second indenture of

^c Ambl. 216.

covenant was good as to the new use of the fine may be questioned, since if a precedent indenture be made to direct the uses of an assurance, and the assurance follows, the Touchstone says, that the donor or recoverer cannot by any act of his, subsequent to such assurance, change or avoid the prior use^d. The second indenture might, therefore, have been regarded as inoperative to its express purpose, and was probably attacked on that ground, for that seems to have been the view in which it presented itself to the court.

It is, to be sure, somewhat difficult to apprehend how a deed which is void, as being fraudulently, surreptitiously, or coercively obtained, and so not moving from the will, or speaking the real sense of the party, should yet revoke a previous act deliberately and formally done. Where a part only of a deed is liable to the imputation of fraud, there may be good reason for holding the other uncorrupted part a revocation of a prior testamentary disposition, as far as it is inconsistent with it; but whatever may ultimately be determined on this point, the understanding does certainly struggle against giving to an act admitted to be invalid against the person performing it, on account of the fraud or compulsion accompanying it, an operation destructive of a prior act considerably and carefully performed. It is true however that, in giving his opinion in the case last mentioned, Lord Hardwicke observed, that it was

^d Vid. Touchst. Ch. on Uses, Sect. 5.

not like the case of a conveyance by covin, which would make it not the testator's deed *at law*; and which, his Lordship said, would be a *nullity*. There is, to be sure, a difference between the case of a deed void at law for covin to which non est factum may be pleaded, and that of a deed liable to be set aside by cancelling or directing a reconveyance, on account of the fraud or compulsion used in obtaining it. But it seems reasonable for a court of equity to act upon its own maxims, in analogy to the rules of law; and if that which in that court is treated as deserving of being frustrated and rescinded, on account of the turpitude of the intent and contrivance, should also be treated as incapable of the collateral effect of revoking a will, this, as it seems, would be no more than a just application of the rule of *equitas sequitur legem*.

PART VI.

Subsequent Conveyances.

THE general rule that where, after making a will, the testator executes any legal conveyance, the will is revoked, has long been established. This rule seems to rest upon technical grounds, and in regarding its whole extent we shall find that the inference of *intention* to revoke by no means affords a satis-

factory foundation for it. The true reason seems to be that which Lord Hardwicke gives in *Sparrow v. Hardcastle*, "that the estate being gone by the conveyance, the will has lost the subject of its operation."

The alteration of the devised estate by the act of the devisor himself is a case of daily occurrence, and admits of some distinctions of great nicety. It will be proper to begin with some examples illustrative of the general rule.

A recovery by tenant in tail, after making his will, to his own use in fee, is a revocation. And this though the party declares he does it to confirm his will.

If a tenant in tail makes his will and devises his land, and then by bargain and sale inrolled makes a tenant to the præcipe, against whom a common recovery is suffered to the use of the testator in fee, this is a revocation of the will^a. And it was said by Lord Hardwicke to have been holden that where a man, after making his will, thinking he had only an estate tail, suffered a recovery to confirm the will, such act by the testator was a revocation instead of a confirmation of the will^b.

A feoffment by a tenant in fee, after making his will, to his own use in fee, is a revocation.

And if a tenant in fee simple devises his lands, and before his death makes a feoffment of those lands to another, to the use of himself and his heirs, though this to many purposes is no alteration of the

^a *Dister v. Dister*, 3 Lev. 108. see also to the same point, *Marwood v. Turner*, 3 P. Wms. 163. Edit. Cox.

^b Per Lord Hardwicke in *Sparrow v. Hardcastle*, 7 T. R. in the notes.

estate, for he is absolute owner as he was before, yet it is a revocation. And, where a tenant for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail, with reversion to himself in fee, made his will disposing of the reversion, and afterwards suffered a recovery and limited the use to himself in fee, this though an ineffectual recovery, was nevertheless a revocation of the will (1).

So is an ineffectual recovery.

The apparent hardship of this rule has occasioned some struggles to oppose its application, where it has been most obviously opposed to the testator's intention. Thus it has been often contended that where the alteration of the estate was only for an express particular and partial purpose, not affecting the substantial and beneficial interest given by the will, the will should not be affected by it. Upon this ground, in *Sparrow v. Hardcastle*, it was endeavoured to be maintained that the conveyance being designed for a particular purpose, viz. to create a trust for the benefit of a person named in it, subject to which the trust declared was to the grantor and his heirs, it was the same as if he had left it to result, and so much of the trust as remained in him would pass by the will;

Conveyance upon a special trust, or for a particular purpose, how far a revocation.

^c 1 Roll. Abr. 615.

(1) 3 Wils. 6. *Darley v. Darley*, and see the remarks made upon this case by the late Lord Loughborough in *Brydges v. the Dutchess of Chandos*, 2 Vez. jun. 430.

but Lord Hardwicke rejected this reasoning, and declared his opinion to be, that if a man seised of a real estate devised it, and afterwards conveyed the legal estate, though only upon a special trust, yet as he granted the whole legal estate, it was a total revocation of the will.

Lord Lincoln's case (2), which was decided by Lord Somers, is a strong authority to the same point; and, as was observed in *Sparrow v. Hardcastle*, there could not be a more special case. Edward Earl of Lincoln had mortgaged the manor of S. to Wynn by a conveyance in fee, and afterwards by will, in default of issue male of his own body, devised it to Sir Francis Clinton (who was to succeed to the title) for his life, with remainder to his first and other sons in tail, with remainders over. The Earl having afterwards taken a fancy to one Mrs. Calvert, and having some notion he might marry her, (though it was proved in the cause there never was any intention in the lady or her relations respecting such marriage, nor any treaty about it) made a lease and release of the devised premises to trustees, to the use of himself and his heirs till the said intended marriage should take effect, then as to part in trust for Mrs. Calvert and her heirs, in lieu of dower, and

(2) Show. P. C. 154. 1 Eq. Ca. Abr. 411. 2 Freeman, 202. and said by Lord Hardwicke in *Sparrow v. Hardcastle*, vid. 7 T. R. 418. in Not. to be well reported in Fitz Gibbon, 241, which was in general a book of no authority.

as to the rest in trust that the trustees should sell it, to disencumber the part limited to Mrs. Calvert, and to pay the surplus of the monies to his executors and administrators. Nothing was afterwards done towards the marriage, and sometime after the will the Earl died without making any alteration of it, leaving his honours to descend to Sir Francis Clinton, who had but a small estate, if any, and who died soon afterwards. The plaintiff, the eldest son of Sir Francis, brought his bill to have a redemption of the mortgage and a conveyance of the estate. And the defendants, who were cousins and co-heirs of the testator, brought their cross bill to be allowed to redeem and to have the estate conveyed to them.

The question was, whether the lease and release by the testator was a revocation; and though it was plain he did not intend, in the event which happened, to revoke his will, and though by the release the estate was limited until the marriage (which it did not appear was ever seriously either in *his* contemplation or in that of the lady) to continue in the testator just as before; the will was nevertheless held to be revoked. It is to be observed that the conversion of this estate into an equitable interest by the mortgage in fee, was the circumstance which brought this case into the court of equity, and that there was nothing in it of peculiarity which varied the effect of it in the view of that court; so that the doctrine of *equitas sequitur legem* was entirely ap-

plicable to it ; and as by the rule of law, if this had been a legal estate the will would have been revoked, there was no reason why a court of equity should proceed on a different rule in determining the case. The decree was confirmed in the House of Lords by a majority of two lords only.

Where that which is done to an equitable estate, would, if the estate were legal, pass it out of one person to another, such act is a revocation in equity, upon the rule of *equitas sequitur legem*.

The deeds executed in the above case were such as, had the estate been *legal*, would have passed the estate out of the testator, and wherever that is the case, the will is revoked at law⁽³⁾. Upon the principle of analogy, therefore, and of that uniformity in the rules regarding property which is so important to be preserved, a court of equity was bound to follow the authorities of the common law courts in the decision of the case just cited, whatever inconvenience to the parties, or repugnancy to common feelings, might be the consequence: and in this view, that is, in reference to the consistency and generality of an artificial system of reasoning, there does not appear to be that absurdity in the case of Lord Lincoln which has been charged upon it by a great judge⁴.

⁴ Lord Mansfield, Doug. 722.

(3) The uses of the intended settlement were certainly inconsistent with the will; but that made no part of the reason for holding the will to be revoked by the lease and release; it was so held solely upon the ground that the devised estate was for a moment parted with and put out of the testator, notwithstanding the old estate was taken back by the same conveyance.

But by a case of great importance, which has lately been decided in K. B.* on a writ of error from the common pleas, whose judgment the superior court confirmed, the general rule may be considered as established to the effect following: That where a person seised of an estate, devises it, and afterwards conveys away his whole estate, though but for an instant, as merely to give a seisin to serve an use, and though he takes back the same estate to the same use as before, or such use is left to result to him so as to be descendible from him either in the paternal or maternal line as it was before, yet the conveyance operates as a total revocation of the will. And though the object of the conveyance be ever so partial or minute, and whether such object be certain or contingent, the same consequence of a total revocation flows from the mere act of parting with the estate. And from the authority of this case together with that of Lord Lincoln above cited, the conclusion is, that whether such estate be legal or only equitable, the same mode of acting upon it by passing it out of the testator, or if that cannot be strictly said of an equitable interest, by doing that with respect to it, which, if it were a legal estate, would pass it out of him but for a moment, will produce the same consequence of a total revocation.

* 7 T. R. 399. 1 Bos. et Pull. 576. Goodtitle on dem. Holford and others, v. Otway.

If the estate of the testator is parted with but for a moment, and the same use is taken back, the will is revoked.

In the case last referred to, A. being seised of certain estates in fee simple, agreed by his marriage articles to settle the same so as to secure his intended wife's jointure, and the portions of younger children, and then upon his eldest son and his heirs male. He afterwards devised the same estates, in case he should happen to die without leaving any issue of his body living at his decease, subject to any jointure he might make to trustees, for a term of 500 years, upon the trusts therein after declared, and subject thereto he devised all his real estate to B. The testator afterwards conveyed the same estates by lease and release to releasees, to the use of himself and his heirs, till the marriage, and then to uses correspondent to the various purposes expressed in the marriage articles, and for default of issue, subject to a term for securing his wife's jointure, to himself in fee. The testator married accordingly, and died without issue. And whether his will was revoked by the settlement was the question.

Those who argued against the revocation contended that the intention of the testator was evidently not to revoke the will, and that as this intention appeared without any resort to extrinsic evidence from the instruments themselves, the court was bound to give it effect. That though in point of form an estate did pass out of the testator to the releasees, yet that was but a momentary effect of the conveyance, for by the limitation of the use to himself, and his heirs,

till the marriage, he was still in of his old use ; and the only operative part of the settlement was that which limited the uses according to the articles, in an event in which the will was to have no operation. That this was a very different case from a feoffment and refoffment, where there was a complete alienation of the land, and an entire new estate was taken back by purchase. That the doctrine must have been originally founded upon an intent to revoke either expressed or necessarily to be implied by law, from the inconsistency of the two dispositions : but that in the case before the court, the two instruments were not only not inconsistent, but the one referred to and confirmed the other, and the settlement was only made in pursuance of the articles. That in all the cases of total revocations implied from subsequent instruments, the deviser changed the whole estate, or the dispositions were inconsistent; but that in the case under consideration there was no inconsistency, nor was the estate changed as to that part of it on which the will was to operate; for the operation of the will was confined to the old fee-simple, which by the limitation in the settlement was returned back to the testator. There was it was said no new modelling of the estate, for the acts which took place subsequent to his will were in the testator's contemplation at the time ; so that the question was broadly this,—whether where the intention was manifestly against a revocation, the instrumental mode of carrying the intention into effect

should nevertheless produce the legal consequence of a revocation.

But the Court decided, that as the testator parted with the estate, notwithstanding the old use resulted to him again, still the conveyance operated as a revocation of the will, because it drew out of the testator the subject matter upon which the will was to operate.

Such a series of well-considered cases have concurred in establishing this particular doctrine on the subject of revocation by a subsequent conveyance, that the general rule, as laid down in the preceding pages, may now be considered as finally at rest. It seems a little extraordinary, indeed, that, when once it had been received in all the courts as an incontrovertible rule, that a conveyance by a man, after making his will, of the devised *lands* to the use of himself, and his heirs for ever, was a total revocation of his will, it should afterwards be seriously contended, that a conveyance of the fee to special and particular uses, and for a special purpose, was not a revocation beyond those uses, or the exigency of that special purpose. For if, where a testator by a subsequent conveyance takes back the entire estate, with the same dominion and the same incidents, his will is nevertheless completely revoked; it seems irrational to doubt, whether, where he takes back only a portion of the

estate, or the ultimate reversion, after intermediate interests carved out of it, his conveyance ought to be considered as a revocation.

From what has been laid before the reader, it seems sufficiently clear that the rule respecting the revocation of wills, above considered, does not rest upon the intent to revoke, either expressed or implied, but has its foundation in the ancient maxim that the testator must actually have the interest in him, which he attempts to devise, at the time of making his will. It may be called an ancient maxim, because, notwithstanding some great lawyers (5) have grounded the reason of the necessity which exists for the testator's being seised of the lands at the time of his making his will, upon the words of the statutes 32 and 34 Hen. 8, viz. "that every person *having* lands, may devise them;" later authorities have with greater correctness held, that this rule is older than the abovementioned statutes of Henry the 8th: for according to all the precedents, the inefficacy of a will to pass lands, whereof the testator was not seised at the time of making and publishing it, applied as well to devises by custom, as to wills authorized by the statutes of Henry the

Of the necessity for the testator's being seised at the time of making his will.

(5) See the case of *Brett v. Rigden*, Plowd. 344, where Lord Dyer grounds the reason of this rule upon the force of the word 'having,' in the stat. 32 H. 8. and see *Butler and Baker's case*, 3 Rep. 31, and *Strange*, 27.

8th. Thus in the great case of *Bunker or Bunter v. Cooke*^f, Lord C. J. Holt observed that it appeared from the precedents, wherein it was uniformly averred that the testator was seised in fee, and that being so seised he made his will, to be absolutely necessary that the deviser of lands should be seised in fee *at the time of his making his will* (6).

Lands acquired by purchase after the will, do not pass by it.

If therefore a testator devises all his lands, and afterwards purchases other lands, and dies without

^f Rep. temp. Holt, 246. 1 Salk, 237. Fitz Gibbon, 232.

Contingent and executory interests are devisable.

(6) Rastall, 274; where the devise was by force of the custom. And see the Writ *ex gravi querela*, in Fitzherbert, which sets out the custom, which is worded not as a general authority to devise *terras et tenementa*, but *tenementa sua*. So that, as the custom is there set forth if they are not *sua* at the time of the devise, they are out of the custom, and the will cannot be rendered effectual by it. But it is proper in this place to apprize the student that this usual form of pleading does not come up to the present liberal sense of the courts in respect to the nature and extent of the interest of which a testator must be possessed to qualify him to devise his estate. Modern decisions have extended the power of testamentary disposition to contingent and executory interests, where the person who is to take is certain, so that the same would be descendible if not devised. *Roe v. Jones*, 1 H. Bl. 30, and 3 D. T. R. 88, in which last case Lord Kenyon said that the word '*having*,' in the statute, must be understood to mean '*having an interest*,' and his Lordship distinguished between such a contingent interest and a mere possibility or expectation or hope of succession, as that of an heir from his ancestor. And see Fearn's Cont. Rem. 5th Ed. 463, et seq.

making a new will or republishing his former will, such after purchased lands will not pass. Serjeant Loveless, in the case of *Brett v. Rigden*, supposed the effect to be different where the devise was of lands specifically mentioned and intended to be purchased, because in such case the intent was manifest (7). But this position was in the above-mentioned case of *Bunter v. Cook*, denied to be law by the Chief Justice, who added that he had looked into the case quoted in the margin, and had found nothing in it to warrant the position. That it was only a note of the opinion of two Judges, viz. Yelverton and Markham^s, that if a man devise land,

^s Bro. Tit. Devise, pl. 15, cites 39 H. 6, 18.

(7) In the case of *Nannock v. Horton*, 7 Vez. Jun. 399. it seemed to be the opinion of the present Chancellor, that a specific devise of personal estate, which the testator was never possessed of, might operate as a direction to the executor to purchase.

And where a real estate is contracted to be purchased, courts of Equity consider the estate as in the purchaser from the execution of the contract; and therefore, as a consequence of this maxim, it will be presently shewn, that a will disposing of the estate, before the contract is performed by a conveyance, is effectual to pass the interest, and is not revoked by a subsequent conveyance either to the purchaser and his heirs, or to a trustee for the purchaser and his heirs. So where personal estate is impressed with the character of real estate, by being agreed to be sold, and the money to be laid out in land to be settled, the person to take the ultimate reversion under such settlement, may devise it by his will, and the estate, though purchased *after the will*, will go in Equity according to such devise. See the case of the *Attorney General v. Vigor*, 8 Vez. Jun. 256.

A right of entry
not devisable.

and be afterwards disseized, and then die, the devise is void and cannot be made good; because the disseisin has turned the estate to a right, which is only a chose in action (8) and cannot be devised away; therefore, says the book, it was held a good plea against the devise, that the devisor did not die seised of those lands; but the book goes on further and

(8) See the case of *Goodright v. Forrester*, 8 East, 552. The fine of a tenant for life displaces and divests the estate of the remainder man or reversioner, leaving in him only a right of entry, to be exercised either immediately for the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the statute 4 Hen. 7, is only to save to all the remainder men, their respective rights of entry within five years after their respective titles successively accrue, without being prejudiced, the one by the other's laches. *But such right of entry is not devisable*, though it may be released. Shep. Touchst. 325. Litt. Sect. 347. Co. Litt. 48, b. 214. a. 266. a. Perk. Sect. 86. [edit. 1642]. And see per Lord Eldon, 8 Vez. Jun. 282. *Attorney General v. Vigor*.

That the fine divests the remainder, see Litt. Sect. 416, and *Fowes v. Salisbury*, Hard. 401—2. It is also clearly held that though the remainder man is at liberty to enter presently for the forfeiture, still he has a future right of entry unaffected by that present right, which may be exercised within five years after the determination of the antecedent interest, by the death of the tenant for life. The Court thought in the case above cited, that such right of entry did not come within the description of the word *interest*, in 34—35 H. 8. c. 514. the remainder man could not be considered as *having an interest* in the thing at the time of his devise; and an executory interest is a very different thing from a *right of entry*, for the purpose of revesting a divested estate.

makes a question, whether if a man be disseised, and then make his will devising his lands, and afterwards re-enter into the lands, it be a good plea to say that the testator had nothing in the lands at the time of the devise. His Lordship then gave it as his opinion that in such a case the reentry (9) would purge the disseisin, and that the testator would be to all intents and purposes, by relation, in from the beginning (10). His Lordship also further observed, that a will was a disposition from the time of making it, and he looked upon this to be Lord Coke's opinion in *Butler and Baker's case* (11).

But if after disseisin an entry be made, the disseisin is purged, the title relates, and the lands pass by a will prior to the disseisin.

(9) But if the testator had died out of the possession it seems clear that the will could have had no effect upon it, and see 11 Mod. 128, et 1 Bos. et Pull. 602, by Eyre C. J.

(10) 38 Hen. 6, 27. and 19 Hen. 6. 17. Observe what is said of this doctrine by the present Chancellor in 8 Vez. Junr. 282.

(11) To prove that a devise was a present disposition to take effect in futuro Lord Holt instanced a case in Lord Bridgman's time, wherein, there having been a devise to two persons, and their heirs, and one of them dying in the testator's life-time, it was held that the survivor should take the whole. This point was also so stated by Chambre J. 3 Bos. et Pull. 22. Perhaps this view of the operation of a will of lands as an *actual* disposition to take effect and become executed upon the death of the devisor, and in the meantime to be subject to be revoked or altered, was in some measure the reason of Lord Kenyon's dictum in *Doe v. Luxton*, 6 T. R. 298. that a person entitled to an estate, *pur autre vie*, under a grant to him, and the heirs of his body, with remainders over, may cut off the remainders and make a complete disposition of the whole estate by his will alone. But it appears in the case of *Campbell v. Sandys*, 1 Schoales and Refroy's Rep. 294, that this opinion of Lord Kenyon

What operation a will has at the time of making it.

Thus too in *Arthur v. Bokenham*^b, in the Common Pleas, Lord Chief Justice Trevor held that the making of a will is the foundation, and an instant disposition, so that if the devisor have not the land (12) at the time, it will not pass (13).

^b Rep. Temp. Holt, 750.

was not agreeable to the sentiments of Lord Redesdale, who observed that he could find no decision that at all warranted that opinion. His Lordship declared himself to think that on principle a will could not have that effect. But it is nevertheless to be observed that his Lordship seemed to ground his objection to the principle on a view of the nature and operation of a will a little different from that which was taken of it by Lord Holt, Lord Trevor, Lord Mansfield, and Lord Loughborough, as appears by the text. For Lord Redesdale does not seem so much to regard it as a disposition, or appointment of the lands in the nature of a conveyance to a particular devisee, as the mere designation of the special heir, against the right of the person to whom the property would otherwise devolve.

(12) It has been observed in a former note, that it is not meant that the possession or an executed interest in the land should be in the testator, it is enough if he have a present interest, though to commence in futuro, or to depend upon a contingency; but a bare expectation as that of an heir, will not suffice, as was observed by Lord Holt, in the above cited case of *Bunter v. Cooke*: and, as appears by the above case of *Goodright v. Forrester*, a *right of entry* is not devisable.

Of the resemblance between wills and conveyances to uses.

(13) Lord Trevor took notice of the resemblance between wills and conveyances to uses, and observed, that no one could raise a use in land which he had not at the time of the conveyance; as where a father covenanted to stand seised of land which he should afterwards purchase to the use of himself for life, and afterwards to the use of his youngest son and his heirs, and then purchased the land and died,

In the case of *Harwood v. Goodright*¹, Lord Mansfield adopts and further illustrates the same reason for the revocation of wills by a subsequent conveyance of the property. “Though as to personal estate,” said his Lordship, “the law of England has adopted the rules of the Roman testament, yet a devise of *lands* in England is considered in a different light from a Roman will; for a will in the civil law was an institution of the heir; but a devise in England is an appointment of particular lands to a particular devisee, and is considered as being in the nature

Difference as to lands, and personal estate.

Which turns upon the distinction between the nature of a will according to the civil law, and the law of England.

¹ Cowp. 90. 3 Burr. 1497.

and the question was, whether the eldest or the youngest son should take, it was resolved that no use could arise to the youngest son, as the father had not the land at the time of making the conveyance; and his Lordship put the distinction well between that case and where a man covenants that he will purchase land by such a time, and then levy a fine thereof to such and such uses. When the land is purchased, and the fine levied, the uses arise upon the fine and not on the deed, and the deed is only evidence of his intention that such uses shall arise, if no uses are declared at the time of levying the fine, for at that time he might declare other uses.

A very material distinction as to the force of the residuary clause in respect of personal and real estate, results from this doctrine of considering a will of land, as to its immediate effect, as a species of inchoate conveyance by way of appointment, viz. if a legacy of personalty lapses, the subject passes with the residue to the residuary legatee; but if a devise of real estate, which is always specific, lapses, it goes to the heir, and not to the residuary devisee. See 1 Vez. 481. 8 Vez. Jun. 25.

of a conveyance by way of appointment; upon which principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute of Henry 8th, which says, that 'any person having lands, &c. may devise.' For the same rule held before the statute where lands were devisable by custom. It is upon the same principle that there have been revocations determined contrary to the intent of the testator, as where he has afterwards made a feoffment or the like, because that has been construed a new appointment."

These decisions, said the late Lord Chancellor Loughborough, result from fair legal, that is, fair systematical reasoning, and do not depend upon any captious nicety. The objections to them arise from considering the disposition by testament of land, in the same view as the Roman testament was considered, or wills of personal estate, which is not a just manner of considering what the law of England permits to be a disposition of land by will. It is not an indefinite disposition of all a man may be possessed of at his death, as is the case of personal property. A disposition of land by will is no more than an appointment of the person who shall take the specific land at the death of the person making it. It is so far testamentary that it is fluctuating, ambulatory, and does not take effect till after the death; but it is in the nature of a conveyance, being an ap-

pointment of the *specific* estate (14). And therefore that course of determinations, which, with some attempts to break in upon it, has been established, and fully established by *Bunker v. Cooke*, and *Arthur v. Bockenham*, has been wisely determined; and not determined upon the literal construction of the statute of wills, but upon the nature of the instrument^k.

All devises of land are specific.

The rule is the same in respect to copyholds purchased by a testator after making his will: they will not pass by the general words of the antecedent will, unless indeed, after they are so purchased they are surrendered to the uses already declared by the last will and testament, as was done in *Heylin v. Heylin*^l, where the will was held to be republished by the words of the surrender. But in *Warde v. Warde*^m, where the testator Thomas Warde, by his will, *reciting that he was seised of a copyhold estate*, (when the fact was not so) devised all his real estate, &c. and afterwards, purchased a copyhold estate and surrendered it thus, viz. "to such uses as I by my last will *shall* appoint;" the will was held not to operate upon this property.

After-purchased copyholds do not pass by the antecedent will.

Except where the will is republished by a surrender.

^k *Brydges v. Chandos*, 2 Vez. Jun. 427.

^l Cowp. 130.

^m Ambl. 299.

(14) Every gift of land, even a general residuary devise is specific. See 7 Vez. Jun. 147. Ibid. 399. because a man can devise only what he has at the time of devising.

Still, however, if a testator is possessed of the property at the time of making his will, the surrender will be operative if made after the will. And in such a case, even if the surrender made after the will, be to such uses as the surrenderor *shall* by his last will appoint, the copyhold will nevertheless pass by the antecedent will^a if the words of such will be general enough to comprehend them.

PART VII.

Of subsequent dealings with the Estate in Equity.

IT has already been shewn that equity preserves an analogy in respect to the effect given to a testator's acts, as operating to revoke his will, and that therefore any disposition or disturbance of the estate, which at law would have produced a revocation, will be followed by the same consequence where the subject is equitable only, as has remarkably appeared in Lord Lincoln's case above commented upon. But if after a will disposing of an equitable estate, the testator takes a conveyance to himself and his heirs, of the legal estate, this is

^a 1 T. R. 435, *Spring and Titcher v. Biles*. N.

no revocation of the will (1). For nothing here passes out of the testator, and what he has subsequently acquired is at least in consideration of equity nothing new, in as much as in the view of a court of equity he had the complete estate before, and therefore that judicature does not regard the property as at all altered.

If a testator having an equitable estate makes his will, and afterwards takes a conveyance of the legal estate to himself and his heirs, it is no revocation.

But if this case be reversed, and the facts be supposed to be, that a man seised of a legal estate makes his will, and then conveys the estate to another in trust for himself, and his heirs, the will is clearly revoked in law, because the subject of the devise is parted with, and the estate which is subsequently acquired in equity is a totally new estate, and therefore not included in the will ^a.

But if, having the legal estate, he devises it, and then passes it to trustees for himself and his heirs, the devise is revoked.

In *Parsons v. Freeman*^b, it was agreed by the marriage articles, that the wife's lands of which she was seised in tail, should be conveyed to the husband in fee; they married; the husband made his will and

If where the legal estate is called in after a will made, any new use is engrafted upon it, the will is revoked.

^a Ibid.

^b 3 Atk. 741.

(1) By Lord Hardwicke, in *Parsons v. Freeman*, 3 Atk. 741, and by Lord Loughborough in *Brydges v. Chandos*, 2 Vez. Jun. 429, and see the case cited by Lord Loughborough from Roll. Abr. 616, pl. 3. Cestui que use before the statute of uses, devises; afterwards the feoffees make a feoffment of the land to the use of the devisor; and after the statute the devisor dies, the land shall pass by the devise. And see *Watts v. Fullarton*, Dougl. 691.

devised these lands : and afterwards the husband and wife suffered a recovery of the same lands to such uses and for such estates as they should jointly appoint, and in default of appointment to the use of the husband, and his heirs. She died without appointing, and it was decided by Lord Hardwicke, that the will was revoked ; his Lordship at the same time admitting that if the husband had only taken the legal estate by the recovery to execute it into the equitable estate, it would have been no revocation ; but in the case as it stood, *new uses* were created, and though no appointment was made, yet, the fee was by the recovery taken differently qualified^c.

But the case is very different where a man having bound himself by articles, makes his will, devising so much as the articles were not intended to operate upon, and then conveys his legal estate upon trusts, by way of settlement in execution of the articles. Upon the principle of the decision in the decisive case of *Goodtitle v. Otway*, above cited, such a conveyance in trust as last-mentioned, would be a complete revocation of the will. The case of *Williams v. Owen*^d, which was decided at the Rolls in 1795, a few years before *Goodtitle v. Holford*, certainly proceeded upon a contrary doctrine ; but that case has been considered as open to great doubt, since the decision of the case of *Goodtitle v. Holford*.

^c Et vid. *Tickner v. Tickner*, cited 3 Atk. 741. 1 Wils. 308.

^d 2 Vez. Jun. 595.

The case of *Williams v. Owen* was shortly this: Comments on the cases of *Williams v. Owen*, and *Brydges v. Duchess of Chandos*. a man being seised in fee, by articles prior to marriage, covenanted to convey his estates to trustees, to the use of himself for life, remainder in trust to secure an annuity to his wife in bar of dower; remainder to trustees for a term to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs; he afterwards made his will, and devised the reversion in fee in the event of his dying without issue; and afterwards and before marriage, executed a settlement in pursuance of the articles, by which he conveyed the estates to trustees, and their heirs, to the uses and upon the trusts of the articles. It was holden that this settlement did not revoke the will, being nothing more than a mere legal execution of the articles.

The Master of the Rolls compared this case in principle to that wherein a testator having devised an equitable estate, takes a conveyance of the legal estate from his trustee, to himself and his heirs, or to the uses of the will. He admitted that after the articles the deviser remained seised of the legal estate, and passed it out of himself by the conveyance; but he said that by the articles he had reduced himself to a remainder man in fee in equity; that having this ultimate trust in fee he devised it, and then the subsequent act with respect to this fee was no more than clothing it with the legal estate. The

objection to this reasoning, however is, that it is not strictly according to the fact, but seems more like misapprehension than could be expected from so accurate a Judge, for there seems to be no propriety in considering the testator as having converted himself by the articles into an equitable remainder man. He clearly retained the whole fee simple in law, and the ultimate reversion, being a part of such fee, was comprized in the will, and afterwards conveyed out of the devisor, which brings the case clearly within the range of the doctrine above discussed.

In alluding to the case of *Brydges v. the Duchess of Chandos*, his Honour observed, that it was impossible not to see that the judgment in that case which gave to the settlement the operation of a revocation was founded upon the variation of the settlement from the articles, and he took it to have been clearly the Chancellor's opinion, that if the settlement had fully followed the articles in the case before him there would have been no revocation.

It is evident, however, that if that was the inclination of the Chancellor's mind, he was furnishing reasons and authorities against his own opinion by the long preface to his very learned and able decree in that cause, wherein he has elaborately expounded the doctrine of virtual revocations by the alienation of the subject of the devise upon the principle and nature of wills, which indispensibly require a

continuation of the same interest from the making of the will to the time of the testator's death.

The facts of the case of *Brydges v. the Duchess of Chandos*^d, were shortly these: the Duke of Chandos, on the 20th of June, 1777, by articles previous to his marriage, covenanted that he would within six months after his marriage convey lands in such manner that he should be seised in fee, and his wife entitled to dower if she survived him, and also that he would within 12 months after the marriage settle the said estates subject to the dower of the Duchess to the use of himself for life, to trustees to preserve contingent remainders, remainder after the deaths of the Duke and Duchess to trustees for a term, to raise portions for younger children; remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. The Duke also covenanted that in case the dower should not be equivalent to 2000 *l.* per annum, his representatives should make good the deficiency. The marriage took effect, and on the 9th of January, 1780, the Duke by his will after confirming the articles, devised all the real estates which he had by the articles agreed to settle, in case he should die without issue male, or in case of failure of issue male in his wife's life-time, to his wife for life; remainder to his daughters as tenants in common in tail, with

^d 2 Vez. Jun. 417.

further limitations. The Duke afterwards executed a settlement, by which, reciting the marriage articles, he conveyed the fee to releasees to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to other trustees for a term, to raise 2000*l.* per annum, for the Duchess, for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the Duke and his heirs.

Upon a view of this case, as above shortly stated, there is an obvious variation in the settlement from the terms of both the articles and the will, and this variation of the interests was much dwelt upon by the Court, to meet the argument of the settlement's being attracted to the articles, so as, by the fiction of relation, to date back in contemplation of equity from a time anterior to the will. But from the whole course of reasoning and illustration adopted by the Lord Chancellor, and particularly from what he says in making the application of his general propositions to the facts of the case, viz. that "he should be apt to say that this was a conveyance of the whole fee; that the object required it; that it was a disposition that would revoke the will at law; and that *that* Court ought not to determine differently from the rule of law as he had before stated it," it manifestly appears what would have been his opinion upon the case if there had not been in it the other ingredient of a substantial variance between the will and the settlement.

There seems, therefore, to have been good ground for the concession of the counsel in the case of *Cave v. Holford*, in Chancery^c; that it is impossible to reconcile *Williams v. Owen* with *Brydges v. the Duchess of Chandos*. The difference, indeed, between a case circumstanced like that of *Williams v. Owen* (2), and that which the propriety of the decree, according to the professed principle of it, required it to resemble, may be expressed by the contrary propositions of *parting* with the estate and *bringing home* the estate.

In *Watts and others v. Fullarton*^f, the testator having previously articed to purchase an estate, became in equity the owner of the estate, from the time of the articles, and having afterwards settled the purchased property by his will, his subsequently taking a conveyance of the estate to a trustee for himself and his

^c 3 Vez. Jun. 684.

^f Cited Doug. 691. Canc. T. 149, 3. 2 Vez. Jun. 602.

(2) The opinion of the Master of the Rolls, in *Williams v. Owen*, supposes the articles, and marriage which followed, to have turned all the estates into equitable estates, so that when the conveyance was afterwards made of the legal estate, it was no more than clothing the equitable fee, which had been devised, with the legal estate.

See the reasoning of the Master of the Rolls, in *Harmond v. Oglander*, 6 Vez. Jun. 218, in explanation of the principle of his opinion in *Williams v. Owen*.

heirs, was on solid equitable grounds held to be no revocation; and the trustee would, of course, be seised of the legal estate upon trusts, corresponding to the directions of the will.

Lord Bathurst, who decided that case, was said by Lord Mansfield to have relied much on the general proposition laid down by Lord Hardwicke, in *Parsons v. Freeman*^b, that “where a man has an equitable interest in fee in an estate, and devises it, and afterwards directs a conveyance of the legal estate to the same uses, this is no revocation.” It is evident, however, that this case of *Watts v. Fullarton*, exceeded the bounds of Lord Hardwicke’s proposition, which supposed the legal estate to be afterwards conveyed upon the *same* trusts as directed by the will; which would be the case of a simple change of the trustee; whereas, in the case last-mentioned, the will had settled the estate in a strict form, and the subsequent conveyance from the vendor was for the benefit of the purchaser and his heirs.

The act which succeeded the will in the case of *Watts v. Fullarton*, was in effect nothing more than a completion of the contract, and upon the strength of what has been laid down by Lord Hardwicke, in *Parsons v. Freeman*^b, and confirmed by later authorities, we are warranted in concluding, that if the

^b 3 Atk. 741. 749.

^b 3 Atk. 741.]

testator in this case of *Watts v. Fullarton*, had taken the conveyance to himself and his heirs, instead of taking it to a trustee for himself and his heirs, such conveyance would have been no revocation in equity, and the effect thereof would have been to have made the heir a trustee for the persons taking under the will.

That the change of trustees is no revocation of a will was held also in the case of *Bark v. Zouch*¹, where A. having made his will, and devised that his feoffees in trust should make a lease to C. and D. for 90 years, at a certain rent, payable to his executors, afterwards procured them to join with him in making a feoffment of the devised hereditaments to new trustees and their heirs, to the use of himself, until he limited new uses thereof, which he never did. It was held that the feoffment was no revocation of his will. And again, in the case of *Doe, lessee of Sir William Gibbons v. Pott*², where a mortgagor devised the mortgaged lands, and afterwards paid off the mortgage, and caused a conveyance to be made by the mortgagee of the legal estate to a trustee, in trust for himself and his heirs, such a transfer of the legal estate was held not to operate as a revocation of the will.

But between the two last-mentioned cases there is

¹ 1 Ch. Rep. 23.

² Doug. 710, and vid. per Lord Eldon, 11 Vez. Jun. 554.

this observable difference, that in *Bark v. Zouch*, the owner of the equitable estate, after devising it, *joined* in the conveyance from the old to the new trustee; whereas in *Doe v. Pott*, it does not appear from the report of the case that the mortgagor was a conveying party in the instrument, whereby the legal estate was transferred to the new trustee. It is probable he was not, having already, and before his will, conveyed his equity of redemption to the trustees of his marriage settlement. It seems, however, that the decision of *Bark v. Zouch*, is agreeable to sound equitable principles; for the reason for a will's not being revoked by a mere change of trustees, viz. because no estate in equity passes out of, or is acted upon by, the testator, seems equally to hold where the owner of the equitable estate joins with the old trustee in conveying to the new, since such act is as inoperative in equity with respect to the beneficial interests, as at law, except for the purpose of being directory of the intended transfer.

In a case where the first of two wills devised land to trustees upon certain trusts, and the second devised the same lands, together with another piece of land, to the old trustees, with others, but upon the same trusts, the second will was held to be no revocation of the first¹, and as it should seem, upon the clearest equitable grounds. For in such a case the estate

¹ 1 Vez. 178. 186. *Willett v. Sandford*.

devised by the first will did not *pass out* of the testator till his death, and there was no *inconsistency* in the devises. The peculiar facts of that case made it important to decide whether the first will was revoked, for though the second will included all the purposes of the first, yet the statute of mortmain having passed between the making of the two wills, unless the estate could pass by the first it could not pass at all, as being for a charitable object. It is true, the second will devised the legal estate to three new trustees, in addition to the old, but still in respect to the two former trustees, and in respect to the trusts themselves, there was no disagreement; and we may remember that the rule with its three branches is this—that a subsequent devise, to revoke a subsisting devise of land, must be inconsistent with such former devise; that the apparent inconsistency must be irreconcilable; and that the first of two wills is, upon the ground of inconsistency, revoked only to the extent of the inconsistency.

Equity holds a very steady course in respect to these revocations of wills by subsequent alienations, applying the rule of law to those interests which are looked upon as the estate itself in equitable consideration, and to equitable purposes, in such manner as to keep the decisions of law and equity, in this respect, the same in principle. Thus, it being the maxim of equity to treat an estate which has been articted to be con-

Revocation in equity by articles to sell for valuable consideration.

veyed by the owner to a purchaser for valuable consideration, from the moment the articles are executed, as vested in the purchaser, and therefore as capable of passing by his will, if properly executed^m, and the subsequent conveyance of the legal interest as having no effect upon the will, being only the medium of carrying the estate home; in pursuance of the same maxim, that Court considers a devise of land to be revoked by subsequent articles to convey or settle the devised premises for valuable consideration; for if the estate, after the articles are executed, is to be regarded as vested in the purchaser, it ought to be regarded as passing by the same act out of the vendor or settler, and therefore by a plain consequence of this rule of equity, a testator by a subsequent covenant for valuable consideration, to sell or settle the devised estate, must be held to have revoked such prior testamentary disposition.

Thus where^a a testator devised to his wife six houses in bar of dower, and the rest of his real estate to his two daughters and their heirs, in moieties, and afterwards, in consideration of the marriage of his eldest daughter, by marriage articles covenanted to settle one moiety of his real estate to the use of himself for life, remainder to the husband and wife

^m See the case of *Broome v. Monck*, 10 Vez. jun. 604; an equitable title acquired after a general devise passes by republication.

^a *Sir Barnham Rider v. Sir Charles Wager, et al.* 2 P. Wms. 328.

for their lives, remainder to the younger children of the marriage in tail general, remainder to the husband in fee; Lord Chancellor King held that although it was but a covenant, and therefore at law no revocation of the will, yet that the same being for valuable consideration, was in equity tantamount to a conveyance, and consequently a revocation of the will, as to the six houses devised to the wife. So that the husband was entitled to one clear moiety of the rents of the real estate, from the death of the testator. And the same doctrine was again laid down by the same Chancellor in a subsequent case^o, and confirmed by the learned Lord who at present holds that high station, in the case *Knollys v. Alcock*^p.

PART VIII.

The Doctrine of Relation.

SOMETHING has already been said on the doctrine of relation, as it applies to this subject. It seems to call for a particular notice, as there is some apparent confusion in the cases upon wills which have turned upon it—a confusion which seems in some measure to have arisen from a neglect to advert

^o 2 P. Wms. 624. *Cotter v. Layer*.

^p 5 Vez. jun. 654.

to the distinct notions conveyed by the word 'relation' in our law (1).

Difference as to the effect of disseisin and subsequent entry, where the disseisin is before and where it is after the will.

In the case of the disseisin^a before adverted to, the relation is of a very forcible kind. By his re-entry the disseisee is circumstanced exactly as if he had never been disseised, for the new possession unites so immediately with the former possession as to destroy the tortious estate, as well as all the legal effects of the tortious act. But it may, perhaps, be reasonably doubted, (2) upon the strong words of statute of wills, and the established maxim of the law, which make the actual having either the estate itself, or an interest amounting to a *jus in re*, so essential to the operation of a devise of land, whether if after disseisin a devise be made of the land by the disseisee, and afterwards an entry be made by him, the relation be such as to make the will operate to carry the land. For it has been said that relation shall never operate to make an act good

^a Vid. *supra*, 298.

(1) It would be too much to undertake to introduce in this place a general explanation of the law on the subject, for being of great difficulty in itself it is rendered more so by the want of an uniform principle in the decisions upon it. A short view of it, however, as far as it is connected with the revocation of wills is called for by the present enquiry.

(2) This same distinction I have since found adverted to by the present Chancellor, in the case of the Attorney General *v.* Vigor, 8 Vez. jun. 282.

which was void for defect of power(3). In the case which was in the contemplation of Lord Holt, the devisor had the estate when he devised; the disseisin only broke the continuance of the ownership; but in the case last supposed, the devisor would have had no estate, but a right of entry only when he made the devise.

In the foregoing case of disseisin the law seems to help and favour the relation on account of the intervening title's being tortious. For as this species of relation is a fiction, and all fictions of law are governed by equity(4), the odiousness of the

(3) See Vent. 304, and see also 3 Rep. 29, Butler and Baker's case, 29, that relations will, in many cases, help acts in law, but will never help acts of the parties, that is to say, to make void acts of the parties good, and therefore if a man enfeoffs an infant or femme covert, and then devises the land, and afterwards the infant or the husband disagrees, that without question shall have relation between the parties ab initio, to this intent that the infant or husband shall not be charged in damages, or receive any prejudices, but shall never make a void grant, gift, or devise, good by relation. But I have endeavoured to shew, that there is a relation of a stricter kind, (and which can hardly be called a mere fiction of law,) which may have the effect of giving validity and efficacy to an intermediate act, which, at the time of its being performed could not have any present operation.

(4) In the case of the Attorney General v. Vigor, 8 Vez. jun. 279, the reader will find an attempt made to reason analogously from this case of disseisin and entry by the disseisee after will, to a case where after his will the testator exchanged the devised lands for others, and an eviction happen after the testator's death, so as to raise a title to recover back the exchanged property. Those who argued against the revocation contended, that as the attempted exchange had

wrong (5), induces such favour to the relation of the recovered right, that the intermediate act is wholly obliterated and out of the remembrance of the law.

Of the effect of
a re-entry upon
condition
broken.

Whether a re-entry for a condition broken by an alienee, or performed by an alienor, restores the old estate so as to remove all consequences of the alienation, seems open to doubt. It does not stand quite upon the grounds of the case, just above put, of

completely failed, the whole transaction was avoided, and the old estate was remitted, precisely as if it had never been out of the devisor. There was an implied condition, upon the presumed title to the land, that if either party was evicted, there was a total end of the exchange, and the other party might enter; that it must be considered as only a parting with the possession without transferring any title, and that as the old estate continued in the devisor, the devise was no more revoked than it would have been by the grant of a lease. But Lord Eldon, after admitting the perfect propriety of Lord Holt's opinion, as to the effect of the re-entry after disseisin by the disseisee in his life-time, adverted to a striking difference between the cases of disseisin and exchange, viz that the disseisin was not the act of the party but a wrong and violence done to him; neither did it escape his Lordship that even in the case of the disseisin, if the disseisee neglects to enter, his mere right to enter would not pass by the will, and that the case put by Lord Holt supposed the entry to be actually made; whereas in the case before him, as it stood upon the facts, the eviction did not happen till after the death of the party, so that the lands conveyed in exchange continued through the life of the party, and at the time the will became operative, under the effect of that conveyance.

(5) Relation will not defeat collateral acts which are lawful, especially if they concern strangers, 13 Rep. 21.

the disseisin, there being no wrongful act to aid the construction of relation. In the first volume of Roll's Abridgment^b it is said, that if a man devise and then alien upon condition, and afterwards perform the condition, and enter and die, it seems the devise is revoked; but in a case mentioned in the reports^c of the same Judge, it is said, arguendo and without contradiction, that entry for a condition broken makes a man by relation in as of his first estate, so as if the possession had never been out of him. And whether the entry be for a condition broken or on a condition performed, the principle must be the same. All agree that after entry, upon condition performed or broken, the party is in as of his old estate, but the doubt is whether it is not too strong to say that *he is in as if the estate had never been out of him.*

If testator aliens upon condition after making his will, and then enters for the condition broken—query, is the will revoked?

This effect can only be given to the entry by supposing it to work by the same forcible sort of relation which has been observed to take place in the case of the disseisin. And indeed it would seem to follow as of course, that if the entry could operate as a *continuance* as well as a *restoration* of the title, the will of the party would be made good by such entry. But it appears to be very questionable whether this is strictly a case of relation at all.

^b 617 Pl. 3.

^c Nicholas v. Simmonds, 2 Roll. Rep. 469.

If any forfeiture is incurred or privilege lost by the alienation, such forfeiture or loss of privilege continues, notwithstanding the alienor's subsequent entry for breach of condition. Thus if a tenant for life makes a feoffment and re-enters for a breach, he shall be tenant for life again, but still subject to the forfeiture. So if tenant by homage auncestrel had made a feoffment on condition, the uninterrupted continuance of the privity in the blood of the tenant was dissolved by the alienation, and after a re-entry for a breach, the tenant would not have holden by homage auncestrel again. For the same reason also if a lord of a manor makes a common law conveyance of an escheated copyhold (which is an enfranchisement) upon condition, and re-enters for breach of the condition, no relation takes place to save the privilege, but the continuance of the custom is broken, and the estate returns without the right of re-granting it as copyhold^d. These cases shew that though the re-entry for a condition broken restores the estate, it restores the estate affected and modified by the act of alienation; and that the law takes notice that it has been once out of the party; so that the weight of reasoning and analogy seems to be on the side of the above cited dictum from Roll's Abridgement; since the inference from these examples is, that the return or restoration of the old estate upon an act of alienation does not imply an unbroken continu-

^d Co. Litt. Estates upon Condition.

ance of title. From the same reasoning we may deduce a confirmation of the propriety of the decision in the case of *Goodtitle v. Otway*. For if we hold to the cases which say, that if a man makes a feoffment in fee to a stranger to the use of himself in fee, there though the old estate is said to return, yet it is not the identical estate, since it comes back first in the shape of the use, and then the statute carries the legal estate to the use which is in a manner a new purchase^{*}; then the cases upon re-entry for breach of condition are much stronger, to shew the legal consequences of the estate's being once out of the party, for in such cases the identical estate does certainly return. At the same time it must be confessed, that if we adopt the opinion that in the case of a feoffment to the use of the feoffor and his heirs, the old use was never drawn out of the party; the above cases upon re-entry upon condition performed or broken, seem to be somewhat weaker than the doctrine which maintains a will to be revoked by an act which never disturbed the real interest of the devisor, but left that use (which before the statute of uses was the proper equitable subject of devise) still remaining unchanged in the party conveying.

I come now to speak of that stricter sort of ~~relation~~ ^{Of relation in its strict sense.} before alluded to, and which, in its ~~true~~ ^{notion}, is that principle by which an act of law is made to

* 1 Roll. Abr. 615, 616.

date back, in legal consideration, to the time of some precedent act, so as to be regarded as the completion of that of which such first act was the proper beginning, and forming in conjunction with it one integral and consummate transaction of law. Thus it has been properly said, that where^f the commencement, progression, and consummation of a thing are necessary to go together, all of them are to be respected. But the thing is to be considered as receiving its perfection from the first. So where divers acts concurrent go to constitute a conveyance estate or other thing, the original act shall be preferred, and to this the other acts shall have relation, as was said by Berkley and Jones, justices in the case of *Harper v. the Bailiffs of Derby*^g. But Lord Hobart has explained this sort of relation with most strength in the case of *Needler v. the Bishop of Winchester*^h, on the question as to the relation of the inrolment of a deed to the king, where that profound Judge observed, "that there are certain relations which cannot properly be called fictions of law, but are real acts, compounded of some simples, which make not a complete or entire act till they come together, and then they make one perfect act working by their nature *ab initio*, even as others do that are in their nature single; but those things are properly fictions of law, that have no real essence in their own body, but are so acknowledged and accepted in law for some special purpose." Of this

^f 3 Bulst. 11.^g Jones, 428.^h Hob. 222.

sort of compounded act the case of a grant to the king, not perfected by inrolment, but which when the inrolment takes place has its effect not from or by the inrolment, but from and by the first act, is said by Lord Hobart to be an example¹; of which kind also is a feoffment within view and a subsequent entry, which entry dates back in effect to the time of the feoffment^k.

The same principle governed the opinion of the bench, as to the second point, in Shelley's case (6), which turned upon the retrospect of the execution to the judgment in the recovery, so as to make the act consummate by relation, in the life-time of the party dying between the judgment and the execution. And there it was said that the execution of every thing which is executory always respects the original act, and all make but one act or record, although performed at different times, for *causa et origo est materia negotii*. Upon the same principle stands the case of dower mentioned in Bingham's case (7), that if a husband levies a fine with pro-

¹ Plowd. Com. 31.

^k Vid. *Parsons v. Pierce*, Pollexfen, 45.

(6) 1 Rep. 106, b. Where, in the vigorous dialect of those times, the recovery is said to be the mother which conceived the use, and the fountain out of which it rose.

(7) 2 Rep. 93, b. Dyer, 72, b. 224. And note that the statute 32 H. 8, which gives an entry to the wife and her heirs, against the alienation of the husband, helps the discontinuance but not the bar.

clamations, and dies, and five years pass after his death, the wife is barred of her dower, for though at the time of the fine levied her title was not consummate, yet the law respects the first and original causes, viz. marriage and seisin.

Of the relation,
in respect to
copyholds, of
the admittance
to the surrender.

Thus also although a surrenderee of a copyhold has no estate in the premises surrendered until his admission, yet on being admitted he is in by relation to the surrender, from the date whereof his admission operates. Should the surrenderor die before such admission of the surrenderee, he dies indeed seised in law of the premises, and though his widow might in strictness claim her free bench, yet on the admis-

See Co. Litt. 326, a. To understand this point, respecting the operation of the fine as a bar of dower, it is necessary the reader should know, that where a person has neither a right in presenti or in futuro, at the time of the fine levied, he is out of the purview of the statute; for as the reporter, in his note to the case of *Stowell v. Lord Zouch*, page 373, expresses it, the purview is against those who have right at the time of the fine levied, or have future right afterwards upon cause arising before, to which future right wrong was done before the fine, or by the fine. Upon the foundation of this proposition, the learned reporter denies the case in the text, contending that in the case of dower the title wholly accrued after the fine, viz. by the death of the husband, for he was of opinion that until the death of the husband no title was consummate, nor wrong done by the conusee in detaining the land from the wife; and that therefore the fine did not reach the title, in as much as it accrued upon cause wholly after the fine, the two first points, marriage and seisin, being of no moment without the third. But this opinion of Plowden is contradicted by all the books. See the *English Plowden*, 373.

sion of the surrenderee that estate is defeated (8), together with all the mesne acts of the surrenderor¹. And as all the mesne acts of the surrenderor would be defeated by this relation, so by force of the same relation all the mesne acts of the surrenderee would be confirmed; and accordingly the surrenderee, after admittance, in declaring in ejectment might lay the demise immediately from the surrender², and recover mesne profits from that time³. On this ground it was, that in a case where a copyholder surrendered to the use of himself for life, with remainders over, and the ultimate limitation to himself and his heirs, and afterwards surrendered to the use of his will, and made and executed his will accordingly, and after such surrender and will made, was admitted upon the former surrender, the will was held not to be revoked, because the admittance related to the time of the first surrender, and the whole transaction

¹ Carthew, 275, Benson v. Scott, 5 Burr. 2764, 2787, Vaughan v. Atkins.

² 1 T. R. 600, Holdfast and Woollams v. Clapham.

³ 2 Wils. 15, Roe d. Jeffereys, v. Hicks.

(8) Sir W. Jones, 451, Parker v. Bleake. It is to be observed, that the relation defeats the widow's bench, because it prevents the husband's dying seised, which (except where it is otherwise by special or local custom, for which see Robinson on Gavelkind, p. 172.) is necessary to ground the title to dower; and therefore an alienation by the husband to take effect in his life-time, bars the claim of the widow. Cro. Jac. 126, Lashmer v. Avery.

might be considered as one and the same*. And Lord Mansfield added, that this was the principal reason which the court went upon in *Selwyn v. Selwyn*[†], for, said his Lordship, after stating some other reasons of the judgment, the great and manly ground upon which the court went in that case was that the deed, recovery, and all the whole transaction was to be considered as one conveyance.

The substance of the case of *Selwyn v. Selwyn* was this: A father, tenant for life, and son, remainder man in tail, executed a bargain and sale, which was duly enrolled, whereby they conveyed the entailed lands to a third person, to make him a tenant to the præcipe for suffering a recovery, the uses of which recovery were declared to be to the father for life, remainder to the son in fee, and after the writ of entry was sued out; but before it was returned the son made a will, whereby he devised the same lands to the father in fee, and died after the recovery was completed without revoking or altering his will. And the following question was proposed by the Chancellor to K. B. "Whether the lands of which this recovery was suffered passed by the will?" The court gave no reasons for their opinion, agreeably to the usage upon cases referred out of chancery; but, according to Sir James Burrow, they repeatedly expressed their approbation

* 1 Blackst. Rep. 605, *Roe d. Norden v. Griffiths*.

† 2 Burr. 1135.

of the case of *Ferrers and Curzon v. Fermor and others*, and therefore it is likely, says the reporter, (who was confirmed by Lord Mansfield afterwards, as appears by the case above-mentioned of *Norden v. Griffiths*.) that they considered the whole as one conveyance, which must relate to the date of the bargain and sale, which was perfected, made absolute, and delivered from objections by the subsequent ceremonies (9).

(9) A writer of great knowledge in his branch of the profession, in page 149 of his treatise on conveyancing, has observed, that until seisin no uses can arise under the recovery, and that consequently until there is seisin in the demandant as the means of supplying the seisin to uses, the person claiming under the uses has no legal estate which will admit of an alienation by deed, but he has an inchoate interest which will allow of his devising his interest by will. The true ground, continues this writer of *Selwyn v. Selwyn*, is that even before the recovery was suffered, the testator had in him a title to a future use, which gave him a power of testamentary alienation, and his will operated upon this use in its fiduciary state, and also on the estate itself, when the use was executed into the estate. He goes on to say that another ground of that case, and the ground to which it is more generally ascribed is, that the recovery and the recovery deed formed one assurance.

Possibly, however, this writer, as he makes no mention, might not have been aware, of the above cited case of *Norden v. Griffiths*, wherein Lord Mansfield, who presided on the bench in *Selwyn v. Selwyn*, declares, most emphatically, that the true ground upon which the decision in that case went was that which this gentleman seems not to admit to have had much share in producing it, viz. that the indentures, recovery, and the whole transaction was to be considered as one conveyance. Indeed the other supposed ground

The case in Cro. Jac.¹ referred to and approved in *Selwyn v. Selwyn*, was in effect as follows: A lessor covenanted with his lessee for years, that a bargain and sale should be made, and a fine levied to the lessee and his heirs, to the use of him and his heirs, to the intent that a common recovery might be suffered against the conussee, with voucher of the lessor, who should vouch over the common vouchee to the use of A. B. and his heirs, who, after the bargain and sale, fine and recovery perfected, brought an action against the lessee for rent arrear, and the question was whether the lease was extinguished and destroyed by the deed fine and recovery? It was agreed, that if a fine or feoffment be made to a lessee for years, to the use of a stranger, it would not extinguish the term (10), for it was saved by the statute of uses, which executed the use, and saved all rights, estates, and interests; but as in this case the bargain and sale was made and the fine levied to the

¹ 643.

seems very refined and fanciful, and stands but ill with the subsequent cases on the doctrine of revocation.

(10) If at the common law, before the statute of uses, a termor took a conveyance of the premises in lease to him, to himself and his heirs, to the use of another, his own term was saved to him in equity. And observe that the legislature did not, by the statute of 27 H. 8, design to prejudice any rights or estates, but to preserve them, so that the operation of the statute would be at once to execute the use as to the reversionary interest, and to prevent the merger of the intermediate estate. See the case in Cro. Jac. 643.

lessee, to the intent that a recovery might be suffered, whereby certainly the term was drowned and extinguished for a time, until the recovery was suffered, (since during that interval, no use being raised, the saving in the statute of uses did not apply to the case,) whether the lease should be revived and recontinued by the recovery which raised the use, and so let in the statute, was the doubt? And the court resolved that it should be revived, for the bargain and sale, and fine and recovery, were all but one assurance, and the recovery being suffered, which was grounded upon the covenant, was quasi a conveyance to the use ab initio (11).

(11) Of a similar opinion, in respect to the relation in these compound conveyances to the first fundamental act, so as to carry back the title to the date of the leading instrument, were the two Judges, Croke and Montague, in the case of *Havergill v. Hare*, Cro. Jac. 510. The case as to this point was as follows: William Parker being seised in fee of lands, on the 31st October, 8 Jac. 1, by indenture inrolled, granted a rent of 20*l.* per annum to Isaac Warden, payable at Michaelmas and the Annunciation, with clause of distress; and by the same indenture covenanted to levy a fine of the same lands to the uses following, viz. that if it should happen that the said yearly rent of 20*l.* should be in arrear, and no sufficient distress upon the premises, or if any rescous, poundbreach, or replevin should be made, that then it should be lawful for the said I. Warden to re-enter and enjoy, till satisfied, out of the rents. On the 12th June, 9 Jac. I. Warden sold and conveyed the rent to William Fisher, the lessor of the plaintiff, with all penalties, forfeitures, &c.

On the 19th October, 11 Jac. the rent due at Michaelmas was in arrear, and was demanded by Fisher, but not paid. In the Trinity Term succeeding a fine was levied to Fisher, to the uses specified in the first indenture of covenant above mentioned. Fisher afterwards

PART IX.

Mortgages, &c.

I SHALL now pass to the consideration of mortgages, securities for money, and conveyances to pay

distrained for the half-year's rent of 10*l.* due at Michaelmas, 11 Jac. and the tenant of the land replevied; whereupon Fisher entered under the uses of the fine. And one of the questions in this case was, whether, as this rent of 10*l.* was due, and demanded before the fine levied, (at which time no use could arise upon the nonpayment) and then *after* the fine levied a distress was taken for the rent due *before* the fine was levied, and afterwards replevin was sued thereupon, a title of entry accrued by way of use to William Fisher? and on this point the Justices were divided, for Haughton and Doderidge held, that as the rent was due before the fine levied, the use upon the fine could not be extended to the rent formerly in arrear. But Croke and Montague held, that the fine levied and the first indenture were but *one assurance*, for the execution of all things executory respect the original act, and shall have relation thereto, and all make but one act, although done at several times. This point, however, cannot be regarded as perfectly decided, and see Vin. tit. Dev. (O) pl. 3, Jones 7, pl. 7, Mitton *v.* Lutwitch, and Salk. 341, Lloyd *v.* Lord Say and Sele, but see S. C. with the observation in 3 P. Wms. 170, in the note to the first edition. It appears from what has been decided and held in courts both of law and equity, in the great case of Goodtitle *v.* Otway, that where articles are made providing for a reversionary interest in the covenantor, and then the covenantor by will disposes of such reversionary interest, and then makes a settlement whereby his whole legal estate is conveyed to uses correspondent to the articles, the will is not saved by any relation of the settlement to the articles

debts, which Lord Hardwicke has enumerated as the excepted cases out of the general rules of revocations^a.

Mortgages in fee are differently regarded in the courts of common law and those of equity (1). At law they are total revocations, but in equitable consideration they are only revocations pro tanto (2). It is not on the ground of the particularity of purpose that a mortgage in fee is in equity held to be only a revocation pro tanto, though the distinction between the practise of courts of equity and law have been often incautiously put upon that ground; but the true reason arises out of the distinct considerations under which mortgages pass in courts of law and courts of equity.

Different consideration of mortgages in courts of law and equity.

^a 3 Atk. 805.

in analogy to the above-mentioned cases of assurances by fines and recoveries.

(1) It seems, however, as if this distinction did not always exist, see 1 Ch. Rep. 82.

(2) And if the mortgage be by deed and fine, it is nevertheless a revocation only pro tanto, in equity, 2 P. Wms. 334, per Lord Chancellor King. But according to Viner tit. devise (P) pl. 10, it was held by Lord Cowper, 6 Ann. that if a man devises lands, and afterwards mortgages the same for years, and then levies a fine sur cognizance de droit come ceo, and not a fine sur concessit, this will be a revocation; but that a fine sur concessit had revoked only pro tanto. It is a critical question whether the principle upon which courts of equity consider mortgages as only revocations pro tanto does not reject this distinction, vid. post. 336.

A court of law can only look to the legal operation of the deed, whereby the testator by conveying out of himself his legal estate, of necessity must be held to revoke a previous disposition by will of that estate, but in equity the transaction has another aspect, and is only regarded as a security for the debt; the deviser remains complete owner, as before, of the estate, subject only to the security, which is in the contemplation of equity nothing but a chattel. And upon the same principle, if, after a devise, the testator makes a conveyance of the whole fee, upon trust to sell and pay debts, the interest of the testator(3) is only affected to the extent of that incumbrance. To that extent the will is revoked, but the equitable estate in the subject of the devise remains unaltered, except in so far as it is become charged with such debts; and therefore if, after such deed of conveyance, the legal estate in the remaining part of the property, when the object of payment of debts has been satisfied by the disposition of part, is taken back by the testator, by a reconveyance to himself and his heirs, his will is unrevoked in equity^b.

In equity, conveyances by way of mortgage, or for payment of debts generally, are only revocations to the extent of the charge.

^b Vid. *Harmood v. Oglander*, 6 Vez. jun. 221.

(3) It is to be observed, however, that if A. devises lands to his executors to be sold for the payment of his debts, and then conveys it to trustees for the payment of debts, the devise is revoked. 2 Ch. Ca. 116.

The late Lord Alvanley (4), when sitting as the Master of the Rolls in the case of *Harmood v. Oglander*, states the criterion for distinguishing when equity will interfere with the law in respect to the revocation of wills by subsequent conveyances, and to what extent, with great precision, and in a manner which shews that the doctrine is not grounded on the particularity of the object of the deed. He lays it down as a primary rule of law, that "any alteration of the estate, or a new estate taken, is at law a revocation, whether for a partial or a general purpose; equity never controuls the law upon revocation, except

(4) It would be a sort of injustice to that learned Judge to omit this opportunity of introducing to the reader the ingenious vindication which, in the course of his judgment in this case, he makes of his decision and doctrine in the case of *Williams v. Owen*. "If, says he, instead of articles, the testator had, before the marriage, conveyed to a trustee, in trust for himself till the marriage, then for himself for life, remainder to the issue in tail, remainder to himself in fee, then made the will, and then had called upon the trustee to convey, and he had conveyed, it is admitted that would have been a complete revocation in law; but as clearly it would not have been a revocation in equity, and the heir must have conveyed to the uses of the will. In principle that does not differ from the case of *Williams v. Owen*. There the deviser was bound by the articles, and he might have been compelled to convey accordingly. Then it is strange to say, that if a conveyance were taken from a trustee it would be no revocation; but if, according to his obligation, he himself conveyed to the same uses, it would be a revocation. No one can deny that articles are in equity equal to a conveyance. No one can deny that he remained a trustee to the use of the articles, and must have conveyed accordingly."

Lord Alvanley's
defence of Wil-
liams v. Owen.

either where the beneficial interest, being distinct from the legal estate, is devised, and the devisor if he afterwards takes the legal estate takes it without any modification or alteration; or where, having the complete legal and beneficial estate at the date of the will, he divests himself of the legal estate, but remains owner of the equitable interest, as in the case of a mortgage, or a conveyance for the payment of debts."

In the above case of *Harmood v. Oglander* the object of the intended recovery was a mortgage, it was therefore for a partial purpose, but that alone could not save it; and though had it been a simple conveyance of the fee by way of mortgage, it would have been only a revocation *pro tanto*; yet the mode of effecting this intention being by recovery, which in equity as well as law passes the whole estate out of the owner into the tenant to the præcipe, to be recovered out of him by the demandant, from whom a new estate is to be taken, the will was held to be clearly revoked; and this although the recovery was not, in fact, proceeded in further than the conveyance to the tenant to the præcipe (5).

In *Sparrow v. Hardcastle*, as that case is reported in a note to *Goodtitle v. Otway*, in the reports of

(5) It must be for the reader to distinguish in principle between the case of a mortgage by fine levied, and a mortgage by recovery suffered, and *vid. supra*, 333, note 2.

Messrs. Dornford and East^c, Lord Hardwicke intimates the true ground on which mortgages in fee are considered in Equity as only revocations pro tanto of a will. "The principal ground," says his Lordship, "on which they put this case is, that this grant was intended only for a particular purpose, and that when that purpose was answered the estate was not intended to be altered, but to remain as before; and this was compared to a mortgage. The reason why mortgages are taken to be out of the general rule is this. It does not depend on the general ground insisted on at the bar of being conveyances for a particular purpose, (4) but on the foot of being securities only. Whether the mortgage be in fee or for years only, is all one in this Court, they are alike considered as chattel interests. A mortgage in fee goes to the executors, (for whom the heir is only a trustee) supports no dower, and has no one property of a real estate."

The true ground on which mortgages in fee are considered in Equity as only revocations pro tanto.

^c Vid. 7 T. R. 417.

^d 2 Vern. 241.

(4) In *Harmood v. Oglander*, Lord Eldon gives full confirmation to this opinion, which case was decided for the intire revocation both at law and Equity, on the ground of there being uses declared upon the recovery beyond the mere purpose of the mortgage. Indeed where a recovery is necessary the estate necessarily undergoes an alteration thereby, and therefore if a tenant in tail makes a mortgage, and for that purpose suffers a recovery, and declares the ulterior use to himself in fee, the estate is altered, and it seems the will is clearly revoked. See 8 Ver. Jan. 1793.

So that upon an accurate consideration of this point, we shall perceive nothing in it which breaks in upon the maxim of *equitas sequitur legem*. The truth being that when an estate is charged or mortgaged, a Court of Equity does not regard the estate as in any way passed, modified, altered, or affected (4); and that court carries the same doctrine to a trust for payment of debts; so that a limitation of the beneficial interest upon a trust to pay debts is not in the view of that court a suspended or springing interest to arise upon a future event, but a present vested estate subject to such trust as a mere charge (5).

Difference between an Equity of redemption and a mere trust.

(4) An equity of redemption imitates more closely the legal estate than a mere trust. See the notice taken of this distinction in *Burgess v. Wheate*, 1 Blackst. 145, and see Sir Matthew Hale's definition of a mortgage. Hard. 469, Pawlet's case. So Lord Nottingham, (M. S.) says, an equity of redemption charges the land and is not a trust. Blackst. 145. A mortgage is not a mere trust, but a *title* in equity. In a word, the equity of redemption is in equity the fee simple of the land, and by consequence, after foreclosure, the mortgagee is considered as acquiring a *new* estate. But if it be a mortgage for a term of years only, if foreclosed, or the Equity be released after the will, the new interest may pass under the general words of the residuary clause; and see 8 Vez. Jun. 276, *Attorney General v. Vigor*, mortgaged and trust estates pass by a will, if the words are sufficient in compass, and there is nothing in the purposes or limitations of the will, which, by their inapplicability to such estates, indicate a different intention in the testator. See 8 Vez. Jun. 417, *Lord Braybroke v. Inskip*.

(5) And there is no difference between a charge for a particular debt, and a general charge for debts. And though the whole is directed by the subsequent conveyance to be sold to pay debts, yet

PART X.

Partition.

PARTITIONS stand upon a different foundation from mortgages or conveyances in trust to pay debts; but they are not more referible than mortgages to any supposed distinction between conveyances for general and particular purposes. There could not be a more particular purpose than that in *Luther v. Kidby*^a, and had this been a sufficient ground, the Chancellor would not have sent it to a court of law.

In neither of the cases of *Luther v. Kidby*, or *Risley v. Lady Ballinglass*^b, is any thing said of a

^a 3 P. Wms. 170, Note to the first edition. 8 Vin. 148 pl. 90.

^b Sir Thomas Raymond, 240.

the surplus is to be paid to the devisee of the estate by the previous will. 2 Vern. 295. *Ogle v. Cook*, 1 Wils. 310, where Lord Hardwicke expressed his approbation of that decision, and see *Lady Vernon v. Jones*, 2 Vern. 241. But where a man directs the surplus to be paid to his executors and administrators, this seems to be a converting of the land into personalty, and so the subject of the devise is specifically destroyed. Vide 2 Vez. Jun. 486. Where a man after making his will conveys in trust for himself, the will is revoked in law and equity. But a deed of trust made by a melancholic person by way of caution has been held no revocation. *Coles v. Hancock*, 2 Ch. Rep. 210.

Established law
that partition is
no revocation.

special purpose. Whenever the point has come under consideration, it has been taken for established law, and has been said to stand on peculiar grounds, but those grounds have generally been left unexplained. And though Mr. Justice Buller, in the case of *Goodtitle v. Otway*^c, observed that cases upon partitions generally happen in equity, he was compelled to admit that long previous to *Luther v. Kidby*, it was established at law that a partition was not a revocation of a will.

It is not very easy to reconcile the cases upon partition to the principles which have usually governed in the cases of revocation (1). It may be a

^c 2 H. Blackst. 525.

Difference between tenants in common, and joint-tenants, as to the effect of partition.

(1) Tenants in common after partition take the same estate as before, though in another mode, *Vid. post* 346. But the partition among joint-tenants has the effect of altering the estates of the parties. In the case therefore of joint tenants, the points of enquiry are the reverse of those which come into question in the case of tenants in common. Where a tenant in common having devised his estate makes a partition, the question it has given rise to has been, whether the devise was revoked by the partition. But where one of two joint-tenants has made a will devising his moiety, and a partition has afterwards taken place, the question has been whether the will has had effect given to it by the partition; the affirmative side of which question could only be maintained on the notion that at the time of making his will the testator, as such joint-tenant, had an interest in its nature deviseable, but prevented from passing as such by being intercepted and supplanted by the *jus accrescendi*. But it has

reason for this doctrine, that the party is compellable by process of law to make partition; which partition so imposed upon a party, has upon such ground of compulsion been held not to disturb his previous dispositions by will. And it is remarked by Lord Hale, in his commentary on the writ de partitione facienda(2), that the writ is brought to ascertain the possession, and the legal estate is not affected. The courts seem to have been careful, however, not to extend this allowance to any case where any thing is done beyond the dry purpose of partition, for where in *Tickner v. Tickner*, cited in *Parsons v. Freeman*^d, the deed gave the moiety in the first place to such uses as the testator should appoint, and in default of appointment to him in fee, Lord Chief Justice Lee, who had signed the certificate in *Luther v. Kidby*, held it a revocation.

Where there is any other purpose declared besides the mere purpose of the partition, the will is revoked.

Mr. Justice Heath declared it to have been his

^d 3 Atk. 742.

been determined that a joint-tenant is under an original incapacity to devise his moiety, being not comprehended within the statute of wills, which being an enabling statute, whatever is not included in it remains as at common law. *Swift v. Roberts*, 3 Burr. 1491.

(2) Fitz Abr. 142, and see a note of this case produced by Lord Loughborough, in 2 Vez. Jun. 432.

opinion * that " the cases of *Luther v. Kidby*, and *Tickner v. Tickner*, were difficult to be reconciled with some of the other cases, and with each other. That the only difference between them was the power of appointment in the latter, and though the execution of the power would be a revocation of the will, yet the mere reservation of the power ought not to have that effect." Buller, Justice, in the same case said, " the case of partition was a case *sui generis*. If the partition was by writ against the wish of the testator it was no revocation, and it was but one step more to hold that the same thing by deed or fine should not have a different effect. The authority of *Luther v. Kidby*, as far as it is an authority, only goes to this, that there is no difference between a partition by fine in pursuance of a covenant and a writ of partition, but the court did not mean to lay down a rule applicable to any other case. Taking the whole together, it seems, said that learned Judge, as if it was thought that there was a difference between a fine for a partition and any other purpose. He agreed with Heath J. that there was no material difference between *Luther v. Kidby*, and *Tickner v. Tickner*, for notwithstanding the power of appointment the fee vested in the testator, and then the deed and fine were the sole ground of revocation in that case, and if so, it was in direct contradiction to *Luther v. Kidby*; and the report of *Parsons v. Free-*

* 3 Vez. jun. 656.

man, in Ambler, shews it was so considered, for Lord Hardwicke approved of *Tickner v. Tickner*, and said it was the same case as that before him (3)."

I find no earlier notice of this question as to the revocation of a will by a deed of partition and find than that of *Lestrange v. Temple*, in *Siderfin*^f, where a quære is made whether, if one holding lands in common with another makes his will and devises all his lands, and afterwards makes a partition by agreement and not by writ, the partition is a revocation. Soon after in the case of *Temple v. Webb*^g, where a tenant in common of a manor, devised all his interest in the manor, and afterwards a partition was made, and a fine levied to corroborate the partition, and the question was, whether this partition and fine were a revocation or not, they were adjudged to be no revocation. And the Judges are said by the Reporter to have entertained the same opinion, (though no judgment was given) in *Risley v. Balinglass*^h.

^f P. 90.

^g *Freem. Rep.* 542, pl. 735, *Vin. tit. dev.* (R. 6) pl. 6. in the Notes.

^h *Sir Thomas Raym.* 240, in the Exchequer.

(3) But as that case is reported in Atkins, a better Reporter, Lord H.'s observation was that *Tickner v. Tickner*, came v. v. near the present; it was not merely to effectuate a partition, but for another purpose and *therefore* Lord C. J. Lee, held it amounted to a revocation, and I am, said his Lordship, for the *same* reason of opinion that the recovery here is also a revocation.

Luther v. Kidby^{*} was thus: A. and B. were tenants in common of lands in fee simple. A. by his will dated 25th January, 1719, devised his moiety in fee; afterwards A. and B. made partition by deed dated 16 May, 1722, and fine, declaring the use as to one moiety in severalty to A. in fee, and as to the other moiety in severalty to B. in fee. This case was sent by Lord Chancellor King to the Judges of the King's Bench, for their opinion, whether the will was revoked, and it appears by the Register's book, that that court composed of Lord Raymond, C. J. Page, Probyn and Lee, justices, certified,—“that they were all of opinion that the will of the said A. was not revoked by the deed, and fine levied in pursuance thereof; and that the said A.'s share of the lands contained in the deed, and the fine levied thereon, did pass by the will of the said A.” with which opinion the Lord Chancellor concurred.

About 20 years after Lord Chief Justice Lee, who has signed the certificate as puisne Judge, in *Luther v. Kidby* or *Kirby*, decided the case of *Tickner v. Tickner*, which was as follows¹: Robert Tickner, seised in fee of the estate in question, which was of Gavelkind, died intestate and left two sons, Henry and Robert, who entered on his death and became seised in Gavelkind; Robert being possessed of an

^{*} Vm. tit. dev. (R. 6.) pl. 30, 1739, and see 3 P. Wms. 169, Note by the Reporter.]

¹ Cited in *Parsons v. Freeman*, 3 Atk. 742.

undivided moiety made his will, and devised it to his wife Elizabeth Tickner, and her heirs. After this will of Robert, by a deed of partition between Robert and Henry Tickner, and by a fine, all the Gavelkind lands were divided, and Robert's share was allotted to him to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. A verdict was found in ejectment, subject to the opinion of Lord Chief Justice Lee, who, after mature deliberation held the transaction to be a revocation of the will.

The doctrine in respect to the question of revocation by partition is founded upon the foregoing cases; but it has been shewn that a part of the Bench in the discussion of the great case of *Goodtitle v. Otway*, doubted of the principle on which *Luther v. Kidby*, was determined; and considered that case and the case of *Tickner v. Tickner*, though the Judge who concurred in the one decided the other, as irreconcilable. Great Judges however, have thought very differently upon this subject. To Lord Chancellor Loughborough both these cases appeared to be rightly and consistently determined, and this opinion was expressed by him in a judgment which displayed in language and argument the most graceful and luminous, his deep acquaintance with the whole subject and its principles^m. Speaking of *Luther v. Kidby*, his

Great opinions on the propriety of the decisions in *Luther v. Kidby*, and *Tickner v. Tickner*.

Opinion of Lord Loughborough.

^m Vid. 1 *Brydges v. the Duchess of Chandos*, 2 Vez. 429.

Lordship observed, " It was sent to law ; and the court of law being of opinion, *and wisely*, that it was not a revocation, this court determined in conformity to the law, following the law. But where the object of the deed went further than a mere partition by conveying the estate to such uses as the party should appoint, Lord Chief Justice Lee held it an alteration in the estate, and that it would not pass by the will at law, and Lord Hardwicke has given his sanction to that authority, and would not determine against the rule of law.

Lord Eldon's
opinion.

The present Chancellor in a case determined by him in 1802, has recognized the law upon these two cases of *Luther v. Kidby*, and *Tickner v. Tickner*, to stand thus : " that mere partition, whether by compulsion or agreement, is not a revocation of a will ; but the slightest addition, as a power of appointment prior to the limitation of the uses, is sufficient". And again in another case decided by him in the ensuing year, his Lordship put the seal of his high authority upon this much agitated question. " The case of partition," said his Lordship, " is a sort of special case. Each party can compel the other to make partition : the estate is the same enjoyed afterwards in a different quality, and in another mode : and upon a principle compounded a little of those two reasons, that which can be compelled, if done voluntarily, and provided nothing more is done

than mere partition, shall not revoke the will. I say, provided nothing more is done, for it has been long established, that if the object is to do any thing beyond the partition, it will be a revocation: it is tried by the fact whether the acts demonstrate any intention to go beyond the mere partition: and notwithstanding the expressions of the Judges in some of the reports, that *Luther v. Kidby*, and *Tickner v. Tickner*, cannot stand together, they have stood together a considerable time and in my opinion are perfectly reconcileable*."

One distinction upon this subject it is very necessary to recollect.—That if the manner in which the partition is made destroys the interest of the testator in the thing given, so that at his death there is nothing in him to answer to the description of the specific subject of the devise, it must follow, notwithstanding the rule that mere partition is not a revocation, that the devise is revoked, since it cannot operate, the thing being withdrawn upon which it was to operate. Thus if A. seised as a tenant in common, or co-parcener, of a moiety of two estates, the one in Berkshire, and the other in Lincolnshire, devises his *Berkshire estate in terms*, and then by a partition between himself and his co-proprietor B. the Berkshire estate is allotted wholly to B., and the Lincolnshire estate to A. the devise is of necessity revoked^p.

But a will may be so confined in terms as to be of necessity revoked by partition.

* 8 Vez. Jun. 281.

^p See the case of *Knollys v. Alcock*, 7 Vez. Jun. 558.

PART XI.

Leases.

THE subject of revocation includes some questions of great nicety in respect to devises of leases and specific chattels. Whether the fresh lease taken by renewal passed under a prior disposition by will of the subsisting original lease was a point in the case of *Marwood v. Turner*^a, before Lord Chancellor King. The argument against the revocation supported itself on the following reasons.—That the testator had expressed in his will his ardent desire that his trustees, to whom the lease was devised, should use their utmost endeavours to continue the lease in the male line, as long as there were any to inherit the title. That as to the surrender of the old lease, that being only to take a better and more beneficial estate, was intended for the advantage of the devisee, to give him a larger and more extensive interest, and to encrease the bounty that was before designed him. Now to make such an intended act of kindness a destruction of the will, would be to invert in the highest degree, the meaning of the testator. That the renewal of the lease was only ingrafting upon the old stock, that which was of the same nature with the old stock, and was a continuation of the same estate with

^a 3 P. Wms. 168.

some little addition to it. That this was demonstrated by the common case, where a trustee of a lease for lives, when all the lives but one are expired, renews for the old life and two new ones, and then the old life dies; here though, but for the renewal, the lease would have been quite at an end, yet the renewed lease is held subject to the same trusts as the old lease was, and is considered as a continuation of the same estate. That it was very usual to make provision for younger children out of these leases, which commonly require a renewal every seven years, or upon the dropping of a life. And if one, so seised or possessed, having made his will and thereby provided for a younger child or children, should soon afterwards renew his lease, but forget to republish his will, (which might often happen) such a construction would create the greatest inconveniences. That no judgment at law, nor decree in equity, had been cited, whereby it had been determined, that the bare renewal of a lease was a revocation of a will. And it was further urged that if this renewal of the lease was a revocation in *law*, yet it would not be so in equity, but the renewed lease would be subject to a trust for the devisee.

But it was held and decreed by the Lord Chancellor, that the renewal of the lease for lives in that case was a revocation of the will as to this particular, for that by the surrender of the old lease the testator had put all out of him, and had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fall, and the

In general a renewal is a revocation, whether it be of a chattel or a freehold lease.

new purchase being of a *freehold descendible* could not pass by a will made before that purchase. And his Lordship expressed surprise that this case which must have often happened, had not been before determined.

We should observe that the true reason upon which this point of revocation turns, is, that the specific thing which was the subject of devise is gone, so that the words of the devise can have no operation. And this reason applies as much to a chattel lease renewed after a will containing a bequest of it, as to a freehold lease, for every specific bequest must upon the same principle be considered as revoked or rather adeemed by the subsequent disposition, alienation, or destruction of the particular subject in the testator's life-time.

A material difference in this respect between freehold and chattel leases.

There is, however, a material difference as to this point between freehold and chattel property. If a lease held upon lives be devised and afterwards renewed by the testator, the devise is revoked although the will should contain words of future import applicable to that interest, for the renewal being a new purchase (1) of a freehold cannot pass by an

(1) A woman purchased a church lease to her and her heirs, for three lives, and died, leaving an infant daughter; two of the lives dropped; the infant's guardian renewed the lease, and then the infant died without issue; the freehold lease was held to be a new acquisition, and of consequence as descendible to the heirs, *ex parte paterna*. *Mason v. Day*, Prec. in Ch. 319.

antecedent will, as has been fully explained in a former part of this work. Whereas if a testator possessed of a chattel renewable lease devises all his *estate, right and interest*, which he shall have to come in the particular lands so in lease to him at the time of his death, or includes it in a general devise of his residuary property, a lease taken by him after making his will, by way of renewal, will by it^b.

In the case of *Carte v. Carte*^c, Lord Hardwicke appears to rest much upon a distinction between *trusts* and *legal estates* in respect to the operation of a will upon these renewed chattel leases, and he alludes to *Abney v. Miller*, as being the case of a legal estate, whereas in *Carte v. Carte*, the testator was only cestui que trust. But in *Abney v. Miller*, his Lordship had said that the rule of revocations must be the same in law and in equity; and the same observation has been made by almost every succeeding Chancellor. In truth it would be difficult to point out a single case, which, when the principles and analogies of equity, and the views, which, from the genius of its particular jurisdiction, it takes of the instrumentary transactions concerning property, are properly attended to, is inconsistent with the rule of *equitas sequitur legem*.

The decision of *Carte v. Carte*, did not seem to

^b See the case of *Abney v. Miller*, 2 Atk. 593.

^c 3 Atk. 174.

require any other distinction to support it than that which arises out of the different import of the words used in the will. The testator in that case bequeathed to his eldest son Thomas, after giving some legacies to other persons, all the rest of his goods, chattels and estate whatsoever, whether real or personal, in possession and reversion, and then by a supplemental clause directed that he should have the disposal of his lease and receive to himself all the profits and advantages accruing from it; which words upon the principles of reasoning adopted by his Lordship, seemed amply sufficient to pass the beneficial interest then subsisting, together with the benefit of all subsequent renewals, and would have comprehended and passed the subsisting lease, and future renewals, had the interest been legal instead of equitable. For his Lordship in the last-mentioned case observed, "there is no question but that a man by will may bequeath a term of years which he has not in him at that time, but which comes to him afterwards. Therefore all these cases of revocations of legacies, or bequests of terms of years, arise from the short penning of the will; and if in the case of *Abney v. Miller*, the testator had said, I give all the interest I have in the lease, there is no doubt but that the renewed lease would have passed (2)."

(2) In *Abney v. Miller*, however, his Lordship intimating the proper words for conveying these after-taken leases, suggests words of a future import as necessary in addition to the words, *all my estate*,

It appears from a careful comparison of the cases, that for the renewal of these chattel leases to be a revocation, the devise of them must be specific, and that whether revocation or not is a question to be determined by that short criterion (3). The case of *Stirling v. Lydiard*⁴ amounts in effect to settle it upon this basis. There the testator gave all and singular his leasehold estate, goods, chattels, and personal estate whatsoever, to his daughter, and if she died without issue living, then to the defendant. The testator afterwards renewed a lease with the Dean and Chapter of Windsor; this was held to be no revocation, and the lease passed by the will; the Lord Chancellor observing, that "it was a mistake to suppose this a *specific* legacy; it was a general devise of the whole. Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass? "If I were to construe this a revocation," said his Lord-

Whether the renewal of a chattel lease is a revocation depends upon whether the design is specific or general.

⁴ 3 Atk. 199.

&c. the words he prescribes are, *all my estate, right, and interest, which I shall have to come in this lease*. And in *Rudstone v. Anderson*, 2 Vez. 418, the Master of the Rolls, Sir J. Strange, would not allow there was any real distinction between the import of the words *all my tithes* and *all my estate in the tithes*. If a new *interest* were acquired after the will, it would not pass by words devising all the testator's subsisting interest.

(3) A. bequeathed his black gelding to B. and afterwards gives him away or sells him, and buys another black gelding; this new bought horse shall not pass by the will. *Wentw. Office Executor*, 23.

ship, "I do not know, but that if a man were to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted that this was a revocation (4). So

Bequests of
stock, when spe-
cific and when
not.

(4) In the case of *Purse v. Snaplin*, 1 Atk. 413, and in the judicious note of the learned Editor Mr. Saunders, the reader will find the learning upon this subject collected and simplified. That case was as follows; R. R. gave to his niece A. S. 5000 l. in the old S. S. Annuity Stock of the South Sea Company, and to his nephew R. P. 5000 l. in the old S. S. Annuity Stock of the S. S. Company. At the time of his making his will, and at his death the testator had only 5000 l. in old S. S. Annuity Stock. The question was between the residuary legatee, and the two particular legatees, whether these last were to have each 5000 l. made good to them, or to divide between them only the one sum of 5000 l. of which the testator was possessed, answering specifically to the description of the gift; and at the Rolls, his Honour was of opinion, that there could but one 5000 l. Old S. S. Annuities pass by the will; but Lord Chancellor Hardwicke held that these legacies were to be considered as two distinct legacies, and that A. S. and R. P. were entitled to have them made good out of the personal assets; his Lordship at the same time observing, that where a particular chattel is specifically described and distinguished from all other things of the same kind, and is not found among the testator's effects, it fails; or if first given to A. and then to B. they *must divide it*; or if disposed of in the testator's life-time it is an ademption of such legacy. The learned annotator observes upon this case, that Lord Hardwicke determined it upon the principle that notwithstanding one of the identical legacies did actually exist at the time of the making of the will, yet as the testator had not so specifically described either of them as to distinguish them from all other things of the same kind, they were to be considered merely as legacies of quantity and number. See *Partridge v. Partridge*, Ca. temp. Talb.

that it appears clearly to have been the settled opinion of Lord Hardwicke, that whether the future lease taken by renewal would pass or not by the antecedent will would depend entirely upon the question whether the words of the bequest confined the supposeable intention to the thing then actually subsisting or extended to future interests growing out of it, in a word, whether the legacy was specific or general (5).

But it should seem according to *Abney v. Miller*, which is a very leading case on this subject, that if the renewed lease be not perfected by execution in the testator's life-time, not only will an agreement for such new lease be ineffectual to operate a revocation, but the actual surrender will not effect the previous disposition of the lease: it was accordingly

226. But in *Jeffreys v. Jeffreys*, 3 Atk. 120, the testator having at the time he made his will actually so much stock as would exactly answer the two legacies which he thereby bequeathed, they were both held to be specific. So where a legacy of this kind is particularized by the word '*my*' (as *my* stock), or by any other expression or description which indicates the testator's intention to make it *specific* or *individual*, (as money in such a bag, &c.) then it shall be deemed a specific legacy. *Ashton v. Ashton*, Ca. temp. Talb. 152. 3 P. Wms. 384, and see Mr. Coxe's note to *Hinton v. Pinke*, 1 P. Wms. 540.

(5) See the case of *Hone v. Medcraft*, 1 Bro. C. C. 261, where the same ground of distinction is adopted. See also *Copin v. Fernyhough*, 2 Bro. C. C. 291.

held by Lord Hardwicke, that as the college seal had not been affixed to one of the renewed leases in *Abney v. Miller*, though the old lease had been surrendered and the new one prepared and accepted, yet the bequest of such lease was not revoked. But this part of the case is not very clear if it can be said to be intelligible at all, without supposing that, the surrender being made by the same instrument as the new lease, probably being stated as the consideration of the new lease, or perhaps implicitly (6) contained in the acceptance of such new lease, such surrender would not be complete according to the intention of the parties until the change and substitution was completed by the execution of the instrument designed to effectuate the renewal. And indeed, supposing the surrender to be made by a separate instrument, yet the making of the new lease, and the yielding up of the old, being reciprocal acts, perhaps the surrender can scarcely be

A surrender in law is an ademption of a specific devise.

(6) This surrender in law is without doubt an ademption of a specific devise as much as the express surrender, for in these cases the effect produced is not so correctly expressed by revocation, as by ademption. See *Wentworth's Office of Executor*, 22 et seq. It is not by countermanding the disposition, but by withdrawing or destroying the subject matter of the disposition that the effect is properly understood to be produced. And whatever destroys the subject of a specific devise, must of necessity annul its operation; thus if after devising an estate held upon lives, the testator purchases the reversion, the devise is revoked and the estate descends. See 2 Atk. 425.

said to be complete, in equity at least, until the fresh lease has been granted.

It is very desirable on a subject into which so much refinement has been introduced, to rest upon some steady propositions. All the cases appear to agree in this—that the surrender of the old and the taking of a new lease, will be an ademption or not of the previous disposition by will according as the disposing words import, a specific or general bequest; but whether particular terms denote the one or the other intention will perhaps long remain a source of controversy. It appears according to the report of *Carte v. Carte*, as has before been mentioned, that Lord Hardwicke was of opinion that if in *Abney v. Miller*, the testator had said “I give all the interest I have in the lease,” the will would have passed the renewed lease, that is, such words would have made the bequest general and prospective. Sir John Strange, as appears from the above cited case of *Rudstone v. Anderson*, thought that the bequest was not the less specific by reason of the words *estate and interest*; and we have seen that Lord Hardwicke, in *Abney v. Miller*, suggests other words of future import to be added to the words *estate and interest*, when he points out a mode of embracing within the will future renewals.

What propositions appear to be well settled on this subject.

Another safe proposition is this, viz. that a testator may by his will pass his future chattel interests whatever they may be, provided they come within

the description of the bequest; and that wherever the words are general, property of this nature though subsequently acquired is comprehended within the scope of them^e; thus if a testator gives all his personal estate whatsoever, and afterwards surrenders a subsisting lease and takes a new one, or makes an entire new purchase of a leasehold estate, both these descriptions of property will pass.

In a very particular case which has been lately determined in the Court of Chancery^f, another proposition of considerable breadth and certainty on this subject is furnished, viz. that whether the disposing words are to be confined to the specific interest, or are to be interpreted as descriptively embracing after acquired property, will depend not only on the import of the particular words, but upon the *general context* of the will.

In *James v. Dean*, which is the case alluded to, the Chancellor took it to be established in *Hone v. Medcraft*, and *Copin v. Fernyhough*, that where there is a general bequest in the terms of "all my leasehold estates," and the testator afterwards surrenders and takes a new lease, the bequest is revoked. With the highest respect for this truly great authority, I cannot forbear observing that in the cases said to have established this proposition, the devise is not in a

^e See the case of *Stirling v. Lydiard*, 3 Atk. 199.

^f *James v. Dean*, 11 Vez. Jun. 383.

general form, but seems to be a disposition of a leasehold estate particularly described and enumerated among other distinct parts of the testator's property. And, indeed, before the general words, "all my leasehold estates," can be held to be a specific disposition of subsisting interests, the opinion and decree of Lord Hardwicke, in *Stirling v. Lydiard*, above cited, seems necessary to be explained out of the way.

But the great point of *James v. Dean* rests the question whether the subsisting interest only or future interests in chattels pass by the will, upon the indications of the testator's intention, and decides that the intention in this respect is to be collected from the whole context, and a comparison of all the parts of the will. The case was shortly as follows:—Thomas James, by his will, dated the 25th of April, 1788, gave and bequeathed to his wife, Judith James, a messuage and some land, at Standgate, held by him under a lease from the Archbishop of Canterbury, and after her decease he gave the same to Sarah James, Jane James, and Elizabeth James, his brother's daughters, their executors, administrators, and assigns, "for all such term, estate, or interest, as shall be then to come therein, as tenants in common." The testator then directed that the rent, fine, and fees, for the renewal of the lease of the said premises, at Standgate, should be paid by his wife, during her life, and by his brother's three daughters afterwards, as such rents, fines, and fees became

payable ; then after giving some other parts of his property he made the following disposition : “ I also give and bequeath to my wife, Judith James, during her life all my messuages, lands, and tene-ments, in Vine street, in the parish of Lambeth, which I hold by lease, under Sir William East, (being the premises in question) for all the residue of my term and interest therein, and after her decease I give and bequeath the same to my godson, Thomas James, his executors, and administrators, for all the residue of the term and interest I shall have to come therein at my decease.” And then the testator gave to his said wife all his leasehold estate at Floatmead, and all other the estate which he purchased of Anthony Keck, Esq. and which he then held by lease from Sir William East, she paying for renewing the said lease at the usual times, during her life, and keeping the said premises in good repair, and after her decease he gave the same among the said three daughters of his brother James, as tenants in common. He then made his wife his residuary legatee, and appointed her one of his executors.

The testator was, at the date of his will, in possession, under a lease granted by Sir William East, of the premises, in Vine-street, Lambeth, dated the 12th of August, 1769, to hold for 21 years from the Lady-day preceding, if the lessor and two other persons should so long live, with a covenant by the lessee, that in case of the death of any of the said lives, (being the lives upon which the lessor held

those premises, with others from the Archbishop of Canterbury,) before the expiration of the term, and the lessor should renew from the Archbishop, he, the lessee, his executors, &c. would pay a proportionate share with the other tenants of the fines to the Archbishop upon every such renewal; and Sir William East covenanted, upon such renewal of the original lease by the Archbishop, to grant a new lease of the premises thereby demised for the remainder of the term of 21 years, which should be then to come and unexpired. But the lease contained no direct covenant for farther renewal.

The testator died in December, 1790, the lease, which expired on the 25th of March preceding, not having been renewed by him. But he had remained in the occupation of the premises until his death, and half a year's rent under this occupation had been paid by him after the expiration of the lease, during his life. Sometime after the testator's death; viz. on the 29th of March, 1791, Sir William East granted to Judith James a new lease of the premises in question, to hold from the 25th of March, for 42 years, if three persons named, or any any of them should so long live. The bill was filed by Thomas James, named in the will, against the executors of Judith James, the testator's widow, praying that the renewal of the said lease by Judith James may be declared to be upon the trusts of the will. The answer insisted that she took the new lease for her own benefit, and this was the question.

The Master of the Rolls dismissed the bill, upon the ground that though a testator might so express his intention as to pass any interest existing at his death, yet in this case his intention seemed merely to give the residue of the term he then had from Sir William East, and that nothing more was in his contemplation. Upon the appeal from this decision the Lord Chancellor considered that the equitable question before his Lordship must depend upon the legal question, whether if the lease had been renewed to the testator it would have passed. It is evident that if the new lease had been made to the testator himself in his life-time, this would have been a case for a trial at law, as being a mere legal question, depending upon the import of the words of the will, in respect to such after acquired property. And it seems to be a rule of equity, to be collected from the case we are now considering, that where the disposing words are such that a court of law would have held the subsequent acquisition by renewal in the testator's life-time to have passed by them, any renewals after the death of the testator, by his representatives, shall be for the benefit of the persons to whom the beneficial interest in the subsisting lease was devised.

It is a rule that where the disposing words would have passed the leases if renewed in testator's life, any renewals after his death by his representatives, will pass by such words.

A tenancy from year to year devisable and transmissible.

Now, in this case, though the testator lived out the lease which he had given by his will to his wife for her life, and at his decease to Thomas James, yet as he continued to occupy till his death, and paid rent, he became a tenant from year to year, which was an

interest devisable and transmissible^s. This legal interest, though become a tenancy only from year to year, attracted to itself that sort of tenant-right, or good will, on which the claim to a renewal would have grounded itself, for it was a sort of excrescence out of the old subsisting lease which had expired. The Court therefore considered, that if this interest would pass by the will, such benefit of renewal would pass also as an adjunct to it, subject to the operation of the same testamentary disposition.

And the good will or tenant-right which accompanies it passes with it.

It was therefore said by his Lordship, that whether the interest of the renewed lease, (supposing such lease to have been renewed in the testator's life-time) would or would not have passed, must be decided, to raise any question between these parties upon the record. For the lease not having been renewed, and the testator being at his death possessed of no larger interest than from year to year, the doctrine cannot be applied, unless it would have been applied, if he had been lessee in the renewed lease. His Lordship then laid it down as a sound rule of construction, that when words are, by their import, *prima facie* equivalent to pass future interests in personal estate, that construction ought to prevail, unless the context, in sound interpretation, calls for another construction; and this depends upon the context of the whole will.

When words are *prima facie* sufficient to pass future interests in personalty, that construction ought to prevail unless controuled by the context.

His Lordship thought that though there was a dif-

^s See *Doe v. Porter*, 3 T. R. 13.

ference between the leases, the lease in question not containing the same direct covenant for renewal which occurred in the others, yet there was enough in the lease in question pointing that way, to lead the testator to think that the expiration of the term would not put an end to the interest. Some parts of the will, particularly the last bequest, must be interpreted to pass the renewed lease, and the different clauses in the will are much the same in effect, though expressed in different words. The obligation upon the wife to renew from time to time, shews that he meant not only the interest *he* had in the present lease, but the interest *she* would acquire under the covenant. Between the bequests accompanied with this express direction to renew, is the bequest of the premises in question; and the person who was tenant for life of these premises, is the wife and the general residuary legatee. His general intention therefore was, that as to the particular part, so specially given to her, she should take only a life interest, and as general residuary legatee she should take absolutely for her own benefit (7).

(7) Had the testator held over after the expiration of his term and died in the mere occupation of the premises as a tenant by sufferance, he could have given no title at all by his bequest. The particular legatee or legatees could have taken no interest in such a subject under his will. And supposing, in such a case, another person instead of the executrix to have been the residuary legatee, the executrix renewing the lease, would, in equity, according to the opinion of his Lordship, have been considered as doing it for the benefit of the residuary

PART XII.

Cancelling.

AMONG the methods whereby a will may be revoked is that of the destruction of the instrument itself by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; which methods of revocation are excepted expressly out of the statute of frauds. But we are to observe that it has been always an established point, both before and since that statute, that the act of cancelling or destroying a will, is in itself an equivocal act, and that its operation as a revocation depends upon the intent with which it was done, which must be made to appear; for if a man were to throw ink upon his will instead of sand, though it were a complete defacing or obliterating of the will, it would not be a revocation; or if a testator, designing to cancel his former will, were accidentally

Cancelling, an equivocal act.

legatee, who, in preference to the particular legatee, would have a right to the benefit of such casual opportunities as arose out of the succession to the *mere occupation*; for the particular bequest could operate nothing, and must have been considered as making no part of the will. But in this case, as the executrix was also general legatee of the residue, it appeared to his Lordship that she would have been precluded from holding it for herself.

If a testator makes a second will, and in terms revokes the first, but it appears that the revocation of the first will was only to give effect to the second, the second will is no revocation if ineffectual for want of the proper attestation.

to cancel one subsequently made and meant to be his last will, such an act would clearly be no revocation ; but in these cases the intention must govern. This was the ground of the determination in *Onyons v. Tyrer*^a, from which case it appears, that if a testator cancels his first will, and by a subsequent will, not properly executed, as by being neglected to be subscribed by the three witnesses in the testator's presence, sets up a devise contained in the first will, the first will, as to such devise, stands unrevoked, notwithstanding the testator in his second will expressly revokes his first, and such express revocation would, in other respects, be available as a declaration in writing within the statute. For it is plain he did not mean to revoke his first will, as to the particular lands devised by it, unless he might by the second will, at the same time that he revoked the first, set up the like devise, so as to take effect by the second will. And if by the latter will the premises had been given to a *third person*, it should never, said the Court, have let in the heir, since the meaning of such second will would still be to give to the second devisee what it had taken from the first, without any consideration had to the heir, and if the second devisee took nothing, the first could have lost nothing.

It is plain that the testator did not mean to revoke the former will by cancelling simply, as a

^a 2 Vern. 743. 1 P. Wms. 345. Prec. in Ch. 459.

self-subsisting independent act, but by substituting at the same time another perfect will in its place, and not otherwise; and therefore the cancelling was but a circumstance, shewing that he thought he had made another good disposition by the second will. The effect of such cancelling depended upon the validity of the second will, and ought to be taken as one act, done at the same time; so that if the second will was not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling of the first will being dependent thereon, ought to be looked upon as null and inoperative also. In a word, it is relievable in equity, under the head of accident or mistake.

Hyde v. Hyde^b, is also a case which shews that the cancelling (1) or tearing a will must be done *animo revocandi* to have the effect in law of destroying the validity of the will. The case was briefly as follows: A man made his will in writing, and thereby devised all his real and personal estate to his wife, her heirs,

^b 1 Eq. C. Abr. 409.

(1) It is obvious that the word, 'cancelling' is used here only to signify the manual operation of tearing or destroying the instrument itself, and not the virtual effect of destroying its validity; and in this sense only is it used, in the clause of the statute of Charles, where its effect of revoking a will is excepted out of the restriction thereby created. But when the cases speak, as they sometimes do, of the *animus cancellandi* it is manifest that they use the word as importing the same as *revocandi*, and not merely as the sign or mode of revocation.

and executors, in trust, to pay his debts and legacies; and then devised several legacies to his children and other persons, and concluded thus:—"In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of A. set my seal to every sheet thereof, and to the last of the said sheets my hand and seal;" which will was properly executed according to the statute.

The testator being afterwards desirous of adding other trustees to his wife, and to make some alterations in his will, sent for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener did accordingly, and the testator read it over and approved of it, and set his hand to it; and, thinking he had now made a new will, he pulled out of his pocket his first will, and tore off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? "Why," says he, "I am cancelling my first will." "Pray," says the scrivener, "hold your hand, the other will is not perfected; it will not pass your real estate, for want of being executed pursuant to the statute of frauds and perjuries;" to which the testator replied, "I am sorry for that;" and immediately desisted from tearing off any more of the seals; and soon afterwards died without having done any thing further to perfect the second will, or to cancel the first. After his death, on application to the spiritual court by the wife, who was made execu-

trix to the second will, it was sentenced to be a good will as to the personal estate, and she was admitted to prove it.

On a bill brought by the legatees against the wife, and other trustees, to have a specific performance of the trust in the first will, and that the estate might be sold pursuant to the directions of that will, it was insisted that the first will was revoked either by making the second, or by tearing off the seals from the first; but the Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being executed according to the statute of frauds, and that as to tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation; but because the spiritual court had sentenced the second will to be a good will of the personal estate, his Lordship also held it good to that extent, and that such legatees of personalities in the first will as are left out in the second, must lose their legacies; but as to such as had legacies by the first will charged on the real estate, if the same legacies were devised them by the second will, that they should continue chargeable on the real estate; provided such legacies were not increased or enlarged by the second will; for though the second will was not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate, for they were not devised

out of land like a rent, but only secured by land, which before was well devised; but as to the new absolute personal legacies devised by the last will, they should be chargeable only on the personal estate, and should have the preference in being first paid out of the personal estate, before the other legacies in the first will charged upon the real estate, because they had several funds out of which they might be paid—the personal legacies in the last will out of the personal estate, which was well devised by that will; and the legacies charged or secured upon the real estate, which was devised by the first will, out of the real estate.

What evidence is admissible to determine the intention; and what tearing or burning is sufficient to revoke.

In the cases last produced the mere mechanical act of tearing is shewn to be equivocal, and to yield to the inference of an intention not to revoke arising from other circumstances. Parol evidence, therefore, of the facts accompanying the act of cancelling is clearly admissible. The principle, however, of the admissibility of parol evidence for this purpose, requires that in a case where the intended cancelling or destruction of the instrument has been prevented by fraud or contrivance, affirmative proof of the animus revocandi should also be received, and that effect should be given to the intention so established. Even if such intention so endeavoured to be defeated by fraud were manifested by *no act* of the testator, it would be consonant to the general maxims of courts of equity to give effect

to the intention, and to treat as perfected that which would have been perfected but for the fraud. So the slightest act of tearing, or an incipient burning amounting only to scorching, will satisfy the statute, where the intention to revoke can be manifested by proof of accompanying acts, or even declarations: but that, without proof of fraud, or partially executed intention, parol evidence could be received to shew a design to cancel, unaccomplished through mistake or accident, no case has yet established; such a latitude would indeed seem to frustrate the caution of the legislature in respect to this object of the statute of frauds.

The case of *Bibb v. Thomas*^b perhaps marks the boundary in respect to the admissibility of this evidence. A testator, who had for two months together frequently declared himself discontented with his will, being one day in bed near the fire, ordered M. W. who attended him, to fetch his will, which she did and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave it a slight rip(2) with his hands, rum-

• 2 BL Rep. 1043.

(2) Tearing is a sufficient revocation within the statute without cancelling by tearing off the seal, if the act be accompanied by any circumstance demonstrative of the intent to revoke. See *Bibb on dem. of Mole v. Thomas*, Blackst. Rep. 1043.

pled it together, and threw it on the fire, but it fell off. M. W. took it up and put it into her pocket. The testator did not see her take it up, but seemed to have some suspicion of it; as he asked her what she was at, to which she made little or no answer. The testator afterwards said that that should not be his will, and bid her destroy it, to which she replied, "So I will, when you have made another;" but afterwards, upon repeated enquiries, she said she had destroyed it.

The testator afterwards told another person that he had destroyed his will; that he should make no other until he had seen his brother J. M. and desired the person to tell his brother so, and that he wanted to see him. He afterwards wrote to his brother, saying "I have destroyed the will which I made; for upon serious consideration I was not easy in my mind about the will;" and desired him to come down, saying "If I die intestate, it will cause uneasiness." The testator however died without making another will. The Jury, with the concurrence of the Judge, thought this a sufficient revocation of the will; in which opinion Lord Chief Justice De Grey and the whole court, upon a motion for a new trial, concurred; the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds, it was both a burning and a tearing; and that throwing the will on the fire with an intent to burn it, though it was very slightly

singed only, and fell off, was sufficient within the statute.

It has been observed in a former part of this treatise, in commenting upon the case of *Onyons v. Tyrer*, that the cancelling is an act not necessarily operating as the revocation of a will; it is a circumstance presumptively indicating and expressing the intention, and presumptively also the execution of that intention; but it may be explained away by particular circumstances. In *Onyons v. Tyrer* the act of cancelling was in some sort merely conditional; it was for the purpose of making way for another disposition, and only for that purpose; and that disposition being never legally effectuated, the act of tearing the first will being unaccompanied with any absolute intention of revocation, was held to be inoperative. But where the act of cancelling has not such immediate reference to another disposition by a new will, but is done upon grounds of absolute dissatisfaction with the will already made, the first will shall not be revived by the cancelling or destroying of a second.

A cancelled will is not necessarily revived by the destruction of a substituted will.

If indeed the first will could be revived, after having been deliberately cancelled and its efficacy destroyed, by the cancelling of a subsequent will, as well might a will *de novo* be made by courts of justice for a party deceased, out of mere facts and conjectures. There is a great and manifest difference

between permitting the act of cancelling to be qualified by reference to the accompanying facts, which may shew it to have been done prospectively and in subserviency to a fresh testamentary disposition, and permitting proof of altered intention inferred from the cancelling of a second will, to re-establish the prior will after it has been once deliberately and unconditionally cancelled. This would be a republication by implication, which we have the authority of Lord C. J. Parker⁴, afterwards Lord Macclesfield, for saying, cannot be done since the statute of frauds.

The case of *Burtenshaw v. Gilbert*⁵ will exemplify the observation just above made. There the testator, in 1759, duly executed his last will and testament, and also a duplicate thereof, but at the same time declared that it was not a will to his mind, and that he should alter it. In 1761 he made another will, which was also duly executed, the devises in which were different from those in the will of 1759, and at the end of it there was a declaration by which he revoked all former wills. After executing the latter will, the testator took one part of the old will in his hands, tore off the name and seal, and directed the person who had made the new will, to cut off the names of the witnesses to the old one, which he did in the testator's presence. The testator at the same

⁴ Com. 385.

⁵ Cowp. 49.

time said that a duplicate of the former will was in the hands of W. a devisee therein. He then delivered the new will to the person that made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in the former will died, soon after which the testator sent for the last will, and in 1762 that will was returned to him. The testator, before his death, sent for his attorney to make a new will, but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found uncanceled in the testator's room, among other deeds and papers; how it came there did not appear(3); but W., a devisee therein, was in the house when the searches were made. The question

(3) In a very recent case in chancery it was held, that where a testator cancels the part in his custody, the strong legal presumption is that the duplicate in the possession of another was not meant to prevail—That if both are in the possession of the testator, the one cancelled and the other uncanceled, the presumption still holds, but it has less strength—If both are in the testator's possession, the one *altered* and cancelled, the other in statu quo prius, the presumption against the operative existence of either may still remain, but with a strength yet more diminished. It seems to have been the doctrine of that case that either of these predicaments is enough to constitute a prima facie case for the heir, so as to throw the burthen of proof on the devisee, who is to encounter the presumption by evidence of contrary intention, see *Pemberton v. Pemberton*, 13 Vez. jun. 290.

Of the presumption from finding a cancelled and an uncanceled will.

was, whether the testator died intestate or not; that is, whether the will of 1759 was revoked? And it was held that the will of 1759 was revoked; first by the new will of 1761, which was a complete, legal, and effectual will, and would have revoked the former whether it had been cancelled or not, because at the end of it there was a declaration revoking all former wills; secondly, because the testator had actually cancelled the will of 1759.

If a testator makes duplicates, and cancels one, the effect of the other is destroyed.

This case also confirms the dictum of Sir Thomas Powis, at the end of the case of *Onyons v. Tyrer*^f, that if a man having duplicates of his will, cancels one of such duplicates with the intention of destroying his will, this is a good revocation of the whole will.

In *Burtenshaw v. Gilbert* the first will was cancelled; but it has been decided, that where a second will is made, the first remaining uncanceled, and afterwards the second will is cancelled, the first is in force as a good will at the testator's death. Thus in *Goodright v. Glazier*^g, where a testator made a will of lands, and afterwards gave the same lands to the same person by another will, but omitted to cancel the former, but before his death cancelled the latter, and both were found in his custody at his

^f 1 P. Wms. 345.

^g 4 Burr. 2512, and see the book 44 Ass. pl. 36.

decease, the second cancelled, the first uncanceled, the first will was held to be effectual; the court observing that a will is ambulatory till the death of the testator. If he let it stand till he die, it is his will; if he do not suffer it so to do, it is not his will. Here though the testator made two wills, yet the second will never operated; for it was only intentional, and the testator changed his intention; and cancelled the second so that it had no effect: it was indeed no will at all, being cancelled before his death: then the former, which was never cancelled, stood as his will.

PART XIII.

Alteration and Erasure.

A WILL is not revoked by alteration or erasure, but to the extent of the particular object of such alteration or erasure; though this seems to have been a point never precisely in judgment before the case of *Larkins v. Larkins*, which was lately decided in the Court of Common Pleas*. We must be careful, however, not to confound erasure with alte-

Difference in the effect of alteration and mere

* 3 Bos. et Pull. 16.

erasure—alteration being a fresh exercise of the disposing power requires the will to be re-executed, to give effect to the alteration, if of freehold estate.

ration, since the latter if it consists in making any new gift or disposition, is to that extent another devise, and will clearly require the will to be re-executed according to the statute(1). The case of *Larkins v. Larkins* was in effect as follows:

William Larkins by his last will, duly executed, devised his lands in M. to his brother, John Pascall Larkins, Samuel Enderby the younger, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust, to sell the same lands for the purposes in the will mentioned. He also gave the residue of his estate and effects to the same persons, and appointed them his executors and the guardians of his daughters. After this will was executed, the testator, with his own hand, made the following alterations: in the first devise to the three trustees, the words "the younger" and "George Smith, of Lincoln's Inn, in the county of Middlesex, Esquire," were struck out by a pen drawn through them; in the bequest of the residue, the words "the younger" and "George Smith, their heirs, executors," were struck out, but over the words "heirs, executors," was written the word "stet;" in the clause appointing guardians, the words "the

(1) In respect to a will of personalty only, the course is to have a sentence against the erasure, and then a probate granted with the word *erased* inserted therein. 1 Vern. 257, *Parker v. Ashe*.

younger" and "George Smith" were struck out; and lastly, in the clause appointing executors, the words "the younger" and "George Smith" were struck out. The testator never in any manner re-executed or re-published his will after making the above-mentioned alterations. And the question was, whether the devise of the real estate to be sold was revoked, by the testator's having struck out the name of *George Smith*, one of the trustees, after the execution of the will.

The ground upon which it was contended that it was revoked was mainly this, that after devising the same estate to two persons, by revoking that devise as to one, the testator had necessarily altered the estate of the other by enlarging it; and that if it could operate at all, it must operate as a new gift, for whatever alters either the quantity or quality of the estate of the devisee must be considered as a new devise. This position however, in which the strength of the argument for the total revocation consisted, was positively denied by the court, by whom it was observed, that in a court of law the trustees must be considered as joint-tenants in fee; that whatever alteration in the interest of the other trustee was created by this erasure, it was an alteration not arising from a new gift, but merely from a revocation. But Mr. Justice Chambre put the point thus: the devisees being joint-tenants are seised per my et per tout; and if one joint-tenant die in the life-time of the testator, the other joint-tenant, takes the whole

of the estate, though it never vested in him during the life of the testator, the reason of which is that the original devise is *sufficient to pass the whole interest*. Had this been the case of a tenancy in common, upon the erasure of one name, the remaining two would take no more than the two thirds of the estate (2).

An erasure of a part of a will, therefore, does not necessarily operate as a revocation of the whole. And it is always to be recollected that the statute of frauds gave no new or positive efficacy to these symbolical modes of revoking a will, but left them upon the same footing as they stood at common law^b.

Short on the demise of *Gastrell v. Smith*, which

^b See Carthew. 81.

(2) Mr. Justice Chambre seems to have put the decision of this case upon its safe ground, viz. that the will was not altered by the erasure, as it was made to carry no more than it was originally framed to carry, since each joint-tenant takes the whole estate. But it would seem unsafe to infer from this case that if an erasure added to the *quantity* of interest carried by the will, such will would not require a fresh execution; as, suppose the words 'for and during his life,' after a gift by a testator of all his freehold estates to B., to be erased, thus converting an estate for life, into a fee. And even if it only changed the quality, still if it thereby altered the estate, it would seem to be a fresh exercise of the disposing power, and to require a fresh execution; as, if after a gift to two and their heirs, the words 'equally to be divided between them' were to be struck out, this would not be merely a revocation but an altered devise.

was determined a few years ago in the Court of King's Bench^c, was the case of an erasure of the name of one of the trustees, accompanied by the additional fact of the substitution of others in his place. There a testator devised lands to two trustees, in trust for certain purposes, by a will duly executed and attested; and he afterwards struck out the name of one of those trustees and inserted the names of two others. The will was not afterwards republished, but the court held that his intent appearing to be only to revoke, by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the due execution of such altered will under the statute, it should not operate as a revocation, or at most it could only operate as a revocation pro tanto, as to the trustee whose name was obliterated. Here it was said, in support of the revocation, that the insertion of the two new trustees in the room of the one whose name was obliterated, distinguished this case materially from those of *Larkins v. Larkins*, and *Humphries v. Taylor*^d; because it manifested the devisor's intent, that the remaining old trustee should not take alone.

But the court observed, that the facts of the case

^c 4 East. 419.

^d 5 Bac. Abr. tit. Wills and Test. 363. Edit. Gwyllim.

plainly shewed that the testator had no object but to change his trustees; and it would be unreasonable when he had not by any thing he had done indicated a disposition to dispose of his lands to different purposes from those declared by his will, to infer that he designed that his will should become inoperative, and so to let in his heir at law by what he did, rather than to conclude, that he thought he had by the alterations introduced made a valid disposition of his estate to the new trustees, and had no design to alter his will except so far as such obliteration and alteration could effectuate that purpose, by substituting the persons whose names he interlined in the stead of him whose name was struck out. If, then, the testator meant no revocation but by means of that, which he through mistake supposed to be a valid disposition to others, and had no intention to revoke by the obliteration he has made, but by an effectual substitution meant to be made of others in the room of him whose name was so obliterated, the case must be governed by that of *Onyons v. Tyrer*.

But supposing the obliteration of the name of the one trustee to have revoked the devise as to him, still the heir would not be let in, for it might be still contended that the effect of the obliteration in this case was at most to revoke only the devise to that trustee, whose name was struck out, and therefore giving to that obliteration its full effect, it would still leave the devise to the other trustee in full force,

and competent to sustain all the trusts of the will in exclusion of the heir at law (3).

PART XIV.

Mistake.

PAROL and extrinsic evidence to control an express revocation, or to effectuate an alleged intention to revoke, not manifested by any act of the testator, it has before been observed, ought not to be received, and the difference is very plain between the admission of such evidence to contradict what is expressed, or establish what has no support from any other indications, and its admission for the purpose of explaining by accompanying acts or declarations, some outward sign of a revoking intention, equivocal in its nature, as the acts of cancelling, obliterating, and tearing, above considered. But even express revocations have been permitted to be controuled by collateral evidence, when that evidence has been furnished by the instrument itself, as where the reasons given by the testator for the revocation

(3) It is obvious on the plainest principle that a *stranger* cannot by tearing, or cancelling, revoke a will. See *Haines v. Haines*, 2 Vern. 441.

Where testator expressly revokes under an obvious misapprehension of facts, the revocation fails.

of a former will are professedly founded upon a mistaken apprehension of facts. *Campbell v. French*^a, is a case of this sort, which though decided in a Court of Equity, proceeded upon a principle of common law. There the testator by his will gave legacies to A. and B. describing them as grandchildren of C. and their residence to be in America; by a codicil he revoked these legacies, *giving as a reason*, that the legatees were dead; the supposition as to that fact being erroneous the legatees were held to be entitled under the will, upon proof of identity(1). But where a testatrix by codicil gave to

^a 3 Vez. Jun. 321.

(1) The case mentioned by Cicero, in his *Treatise de Oratore*, lib. 1. c. 38. has been often cited, and relied on as a sort of authority in our Courts, more especially in those where the civil law is taken as a guide, for admitting evidence of this mistake of facts, to affect the validity of a testamentary disposition. We are to observe, however, that in that case the error was occasioned by palpable misrepresentation, and that misrepresentation was the immediate and sole impelling motive with the testator for altering his will. "What cause (says Cicero) could be more important, than that of the soldier, whose death being announced at home by a false messenger from the army, the father trusting to the report made another his heir and died." There was also another question arising upon that case, on the principles of the civil law, viz. whether a son could be disinherited of his patrimony (for by that law he had an inchoate sort of property in his father's effects) whom the father had neither appointed heir by his testament, nor disinherited by name? And this last reason seems to have been alone objection enough, as the will was by such omission what the civil law denominated "*testamentum inof-*

A. the legacy which she had given by her will to the children of B. prefacing such alteration thus, "As I know not whether any of them are alive, and if they are well provided for," though they were in fact living, A. was nevertheless held to be entitled, the words above cited being construed to mean that if they were living they were well provided for.

But before such express revocation can be vacated upon such grounds, it ought, I conceive, to appear very distinctly, that the mistaken facts were the impelling motives (2) to the revocation; and it must be remembered, that in the *Attorney General v. Lloyd*^b,

The mistake should appear to be in that which constituted the impelling motive to the revocation.

^b 3 Atk. 552.

ficiosum." - But the error as to the fact seems also to have been considered as a good ground of objection by Cicero. See also *James v. Greaves*, 2 P. Wms. 270.

(2) If a man gives a legacy to his wife by the description of his *chaste* wife, evidence of her incontinence is not admissible; and if a testator, out of love and affection to a child, supposing it to be his own had given it a legacy, and it turns out that the child was not his own, in such a case, according to the opinion of Lord Alvanley, in *Kennell v. Abbott*, the legacy would not be revoked by the mistake; but where a legacy was given to a person under a particular character, which he had falsely assumed, and which alone could be supposed to be the motive to the bounty, as where a woman gave a legacy to a man in the character of her husband, whom she described as such, but who at the time of the marriage-ceremony with her, had a wife living, the legacy failed, 4 Vez. Jun. 802. *Kennell v. Abbott*.

Lord Hardwicke observed, that “it is a very nice thing to say that because the reason a man gives for his devise is false, therefore his devise shall fail, and how far that will extend I cannot say.” The case of the Attorney General v. Lloyd, was shortly as follows:—J. M. by his will, dated February the 8th, 1734, gave particular lands and his personal estate to be laid out in lands to charitable uses, and by a codicil, dated July 12, 1736, declared that if by the mortmain act the estates could not pass to those uses, he gave them to M. B. and his heirs. By a second codicil of the 17th of March, 1736-7, reciting that he had been advised that the devise of his *lands* was void, gave his *personalty* to the same charitable uses, and his real estate to M. B. The mortmain act passed in 1736, and the testator died the 8th February, 1737. The advice upon which the testator professed to proceed, appeared not to be well founded; for it was decided in *Ashburnham v. Bradshaw*^c, by the certified opinion of all the Judges^d, that a devise of lands to charitable uses, made before the statute of mortmain, *notwithstanding the testator survived the statute*, passed the lands.

But Lord Hardwicke reasoned thus, on the principal case: “That the testator was so advised, was a fact, in his own knowledge, and he grounded the devise in the codicil upon this advice, and not upon

^c 2 Atk. 36, and see the cases in note 1. Ed. Saund,

^d Except Denton J. who was in ill health.

the reality of the law; which, however that might turn out, he might be anxious to quiet a doubtful question, and to prevent its being litigated after his death, by settling it upon some certain foundation." But the principal reason which weighed with his Lordship was, that he doubted whether the new disposition by the codicil was put singly upon the point of law, the words of which were, "It being my intention that the charity should be continued, and being advised my personal estate can be given, I do, therefore, by this codicil, give my personal estate to the charitable uses before-mentioned; and I do hereby give my real estate to M. B." A case was made for the opinion of the Judges of the King's Bench, and that Court certified in favour of the devise of the real estate by the codicil.

A remarkable case* on the subject of revocations by codicil, occurred in the Court of Chancery, some years back, which is proper in this place, as shewing an important distinction as to this point between wills and codicils. The testator, by his will, gave two annuities to Sarah Crosbie. By a fourth codicil he revoked those annuities. Two days after the execution of that codicil, the testator made a fifth, expressly calling it a codicil to his will, by which he substituted one executor for another, and then declared that that was the only point in which he made any alteration in his will.

* 4 Vez. Jun. 610. *Crosbie v. Mac Douall*.

The question was, whether the fourth codicil, so far as it was inconsistent with the will, was revoked, in consequence of the reference by the fifth to the will. The Master of the Rolls^f, adverting to the stress which had been laid upon the case of *Lord Walpole v. Lord Orford*^g, observed, that that case only determined that a codicil referring to a former will as the last will, cancels intermediate wills. But the point contended in this case is, that it sets up all the will against a codicil revoking it in part. The case will not by any means bear out that argument. It is perfectly true, that *if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it.* There is a great difference between *wills* and *codicils* in this respect. If there are two separate papers, both called *wills*, inconsistent with each other, it is not the rule to prove both in the Ecclesiastical Court. The last is the will. From the nature of the instrument it revokes the other. If the last purports to be the whole will, a complete substantive will, they do not, I conceive, prove both. Unless there is something to shew it was meant to be coupled with another instrument, it is not taken to be a codicil. But if it do purport to be coupled with another instrument, it is as much a part of that instrument as if it were written on the same paper. Many absurdities would flow from the contrary construction. Suppose a testator had by his will given a legacy of 200*l.* and by a codicil had given the le-

If a man ratifies and confirms his last will, he ratifies and confirms with it every codicil which has been made to it; and if an intermediate codicil has changed any part of it, it is confirmed with these changes; for the codicil was a part of it. But if a will is made, and then another will making some different dispositions, and then a codicil confirming the will first made, the alterations made by the intermediate will are gone.

^f Lord Alvanley.

^g 3 Vez. 402.

legatee 100*l.* instead of the 200*l.* and then should make another codicil, of this sort, merely changing an executor, and ratifying and confirming his will in all other respects, is the legatee to have both the 200*l.* and the 100*l.*? That must be contended.

This case differs from *Lord Walpole v. Lord Orford*^b in this essential point. The question in that case was not upon a will and a codicil. It was upon two inconsistent wills; one made in 1752, the other in 1756. The second had destroyed the first, unless the testator thought fit to revive it. He made a codicil in 1776, which he expressly declared to be a codicil to his last will and testament, dated the 25th of November, 1752. That was held to revoke the intermediate will. All that the Courts of Law (2) determined was, that the evidence could

^b 3 Vez. jun. 402.

(2) See the case of *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138. The doubt was whether the will of 1752 was revived by the codicil, which expressly referred to the first will in point of date, but which might be considered as contemplating the will of 1756, if the word *last* in the codicil were to be read as denoting that which was posterior as to the time of the making. External evidence of facts and declarations were offered to shew that the testator had no design of revoking the will of 1756, and to enforce the propriety of receiving this evidence it was contended, that as the ambiguity was introduced by the production of matter external, viz. the fact of the existence of the two wills with the contrariety in the terms of the reference by the codicil, parol evidence ought to be admitted to ex-

not be admitted to prove a mistake. It would not at all affect the case of any codicil made as an appendix to either of his two wills. If the will had dropped, perhaps a codicil, professedly a codicil to that will, would have dropped with it.

PART XV.

Of the Doctrine of Revocation, as to Wills made under Powers.

IN a former part of this Treatise, where the execution of wills was under consideration, that part of the subject was viewed in its connection with wills made under and in execution of powers: it seems important also to consider how the law in respect to revocations applies to this description of wills.

plain the doubt. But the evidence was refused on the ground that there was not in truth any ambiguity in the case, the word *last* being in the opinion of the Court. no counterpoise to the express reference to the earlier will by date. A will is ambulatory till the death of the testator, and there is properly no *last* will until that time arrives, and his calling the will of 1752 his last will, imported only an intention that it *should* be his *last*. See a full note on this case in Roberts on statute of frauds, page 20. That the word *last* is merely a word of form, see *Thomas v. Evans*, 2 East, 496.

It appears to be a general established point, that the instrument by which a power is directed to be executed, must have the requisites which specifically belong to its nature, and proper constitution, and be attended also by all the train of incidents which legally accompany it^a. Upon this principle it is that a will made in execution of a power, is to all intents a will; it is ambulatory and incomplete till death, and alterable and revocable by cancellation or any of the methods whereby a will in the strictest and most absolute sense is so affected. It is also equally clear that if an appointee under a power executed by will, die before the appointer, the interest under the appointment fails by lapse, as in the ordinary cases.

An appointment by will works by the will according to the nature and qualities of such an instrument.

This rule is universal. It extends to a will of copyhold, which, though not considered as the act by which the estate is transferred, (that being the operation of the surrender), is nevertheless in its own nature specifically a will, though in its instrumentary operation it is only directory of the uses of the surrender. Thus, if a copyholder surrenders to the use of his will, and then makes his will in favour of A. and survives him, the benefit is gone; for as a will the appointing instrument is inefficacious till the death of the appointer, and if the appointee is not then in existence, the gift cannot take place^b. It seems

^a 2 Freem. 61.

^b See the great case of the Duke of Marlborough v. Lord Godolphin, 2 Vez. 61.

Some particular instances of this rule.

also that an appointee under a power must claim according to the nature of the instrument by which the power is directed to be executed. Thus, if a power is given by deed to appoint lands by will, and the person to whom the power is given makes his will accordingly, and gives the lands to A. *and his issue*, which words in a deed convey only an estate for life to the grantee, though the devisee takes properly under the power, yet because the appointment is by will, the words are construed to convey an estate tail. So it seems if it were "to A. for ever," the estate would be construed a fee simple for the same reason.

Upon the same grounds, such an appointment by will, in execution of a power, is held to be revocable^c, and therefore, though where a power is executed by deed, unless a power of revocation is reserved by the deed, (which may always be done *toties quoties*, whether the deed creating the power gives authority to revoke or not^d,) the appointment cannot be revoked (1), yet if it be executed by will

^c 2 Vez. 77. S. C. *ibid.* 610, and see *Robinson v. Hardcastle*, 2 Bro. C. C. 30, *Reid v. Shergold*, 19 Vez. jun. 370.

^d *Adams v. Adams*, Cowp. 651.

(1) *Hatcher v. Curtis*, 2 Freem. 61. And such appointment by deed cannot be revoked without a fresh reservation of a power in the executory instrument for that purpose, though the original deed should expressly authorize such future revocations, as was adjudged in the leading case of *Hele v. Bond*, Prec. in Ch. 474.

no such fresh power of revocation need be reserved*; the nature of the instrument supplies it.

By the case of *Cotter v. Layer*^f, which has been already cited to shew that a covenant entered into for valuable consideration amounts to a conveyance in Courts of equity, and is therefore, in those Courts, held a revocation of a will, it also appears that where the will works as an appointment under a power, it is equally revoked in equity by such executory contract under seal. In that case, though the will was made in execution of a power by a married woman, who cannot in strictness make a will at all, and the conveyance was only in fieri, and the instrument purporting to be a will was not strictly a will but an appointment, the person making such instrument being under a disability in law (2), yet

* *Hatcher v. Curtis*, 2 Freem. 61, and see 1 Vez. 139. 1 Bro. C. C. 533, 2 Bro. C. C. 319.

^f 2 P. Wms. 662.

(2) It seems that a married woman may, with the consent of her husband, make a proper will, and proveable in the Ecclesiastical Court, *Maziot v. Kinsman*, Cro. Car. 219, and that the will of a femme covert cannot be given in evidence until it has been proved in the Spiritual Court; see *Jenkin v. Whitehouse*, Burr. 431, and *Stone v. Forsyth*, Doug. 707, where Lord Mansfield says, if the Ecclesiastical Court will not grant probate, the proper course is to appeal to the delegates. Mr. Douglas in note († 150) ib. observes, that the regular course in cases like this is, for the Spiritual Court

the first instrument was adjudged to be revoked by the second.

Lord Hardwicke decided the case of *Oke v. Heath*, agreeably to this doctrine, declaring that the foundation of his opinion was, that wherever such a power to appoint is given to a married woman, which she executes by will, it is subject to all the qualities of a will. She has, said his Lordship, executed her power by will, and called it so throughout: the whole frame is testamentary. And although this arises out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will, takes under the power in the same manner as if their names were inserted there; yet they must take according to the nature of the power and instrument taken together. And in another place^s, Lord Hardwicke is more explanatory on this particular point, where he says, that the meaning of persons taking *under* the power, or as if their names had been inserted in the power, is that they shall take in the same manner, as if the power and instrument executing the power had been incorporated in one instrument; they shall take as if all that was

^s 2 Vez. 78.

not to give probate of the will, but administration with the will as a testamentary paper annexed.—See 3 Atk. 160. *Ross v. Ewer*, and note (1) by Mr. Saunders.

in the instrument executing had been expressed in that giving the power. So it is, said his Lordship, in the appointment of uses. If a feoffment is executed to such uses as he shall appoint by will; when the will is made, it is clear that the appointee is in by the feoffment; but he has nothing from the time of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and the appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the creation of the power, but according to the time of the act executing the power^b.

PART XVI.

Subsequent marriage, and children.

AMONG implied revocations, and as such not falling within the statute of frauds, is that which is produced by a subsequent marriage and the birth of a child or children, on which point the case of Lugg

^b And see *Vanderzee v. Aclom*, 4 Vez. Jun. 771.

The general rule is, that marriage and the birth of a child is an implied revocation as well of a will of real as of personal estate.

v. Lugg (1), is said to have been the first affirmative decision. The point was said to have been afterwards doubted, but was at length recognized as a rule of law (2), though it received no adjudication as to real estate till the case of *Christopher v. Christopher* was determined in the Court of Exchequer in 1771^a. It appears from the report in Ambler, of *Parsons v. Lanoe*, that Lord Hardwicke entertained doubts as to the applicability of this rule to real estates, but we have observed that it has since been carried to that extent, if that could be said to be extending the rule which was no enlargement of its principle, for there seems to be no foundation for saying, that the presumption on which it grounds itself is less applicable to one description of estate than another (3).

^a See 4 Burr. 2171, 2182. Dougl. 35.

(1) 2 Salk. 592. 1 Lord Raym. 441. by the delegates, among whom was Lord Chief Justice Treby.

(2) *Brown v. Thompson*, 3 Eq. Ca. Abr. 413. *Parsons v. Lanoe*, 1 Vez. 189. - Ambl. 557.

Origin and gradual adoption of the rule.

(3) It appears that the rule under consideration was borrowed from the civil law, and incorporated into our law, with some hesitation, and by very gradual adoption. Lord Kenyon has remarked that a very able lawyer, Mr. Justice Perrott, dissented from the decision in *Christopher v. Christopher*, lest the statute of frauds should be thereby repealed, and having a jealousy of introducing the civil law, he resisted the force of those arguments which found their way to

The general rule was admitted in *Brady*, lessee of *Norris v. Cubitt*^b, the Chief Justice at the same time observing that in his recollection there was no case in which marriage, and the birth of a child had been held to raise an implied revocation, where there had not been a disposition of the whole estate (4). In the last-mentioned case, Lord Mansfield expressed great doubt whether the circumstances of the case were such as would raise the presumption, the testator having in contemplation of his marriage settled 800 *l.* a year upon his intended wife, so that he not only contemplated the change in his situation

Lord Mansfield's doctrine in respect to the admissibility of extrinsic evidence to rebut the presumption.

^b Dougl. 31.

the other Judges who determined that case. But his Lordship added, he was glad those Judges did over-rule his opinion, because no person could wish that his family should be put into such a situation as to be deprived of all provision, and that the secondary objects of his bounty should be preferred to his immediate children. 5 T. R. 58.

(4) Whether the rule is still to be so understood in the full extent, or whether an insufficiency left to provide a reasonable support to the family, is foundation enough for the application of the rule, seems not yet to have been positively determined. But it is evident the rule would be made to depend upon very loose criteria, if it were to have place where the marriage, and birth of a child, were not preceded by a total disposition; for it must in such case either depend upon the fluctuating question of what was enough for the family in each case; or if every partial disposition, however small, were to be revoked by these events, then it must rest upon this proposition, viz. that every man who marries, and has issue, must necessarily mean all he has in the world to become theirs.

Whether the previous disposition of the whole estate is necessary to ground the application of the rule.

to take place after his will, but actually provided for it, as to his wife, by his will, and his Lordship appears to have considered the rule as flexible to the particular circumstances of each case, and standing only on a presumption of fact, which like all other presumptions of the same kind might be rebutted by every sort of evidence. According to this view of the principle of the rule, the facts of the case were admitted to furnish a counter inference to the presumption of the rule, which was made to give way; and the will was adjudged upon these grounds, to be unrevoked by the subsequent marriage, and birth of a child.

The principle of the rule according to Lord Kenyon.

In subsequent cases the rule has been considered as standing upon firmer ground than a mere presumption of fact. In *Doe v. Lancashire*^c, Lord Kenyon was of opinion that the foundation of the principle was not so much a presumed intention to alter the will, implied from the circumstances afterwards happening, as a tacit condition annexed to the will itself at the time of making it—that the party does not *then* intend that it should take effect if there should be a total change in the situation of his family. And Lord Alvanley, in *Gibbons v. Caunt*^d, expressed a disapprobation of the practice of receiving parol evidence to rebut the presumption, which he seemed to think should be considered as inevitably arising from the subsequent marriage, and birth of a child.

^c 5 T. R. 49.

^d 4 Vez. Jun. 848.

The decision in *Christopher v. Christopher*, went a little beyond former cases not only in carrying the rule to *real estate*, but in applying it also to the case of a second marriage with children, where there were no children of the first marriage.

By the case of *Gibbons v. Caunt*^{*}, it was left a question, and so it still remains, whether, if a testator has more children by a first marriage born after the date of the will, and becoming a widower marries again, and has no child by the second wife, the will is revoked. Lord Alvanley, however, observed that there was not a single argument applying to the feelings of mankind, that did not apply as much in the case before him as in the simple one of a subsequent marriage and the birth of a child.

Whether a will is revoked by the birth of more children by a first marriage after the will, and a second marriage without children.

It was held, however, in the well considered case *ex parte the Earl of Ilchester*[†], that a second marriage and the birth of children, *where the wife and children were provided for by settlement*, and there were children by the former marriage, which was before the will, was a case of exception to the rule in question, and the will in that case was held not revoked. And this decision appears to strengthen what was observed by Lord Mansfield, in *Brady v. Cubitt*, on the testator's having in his contemplation, at the time of making his will, the provision

^{*} 4 Vez. Jun. 840.

[†] 7 Vez. Jan. 348.

for his intended marriage in his contemplation, and seems to favour the doctrine of founding the principle of these cases rather upon presumption from intention, than a fixed and permanent rule of law.

The Lord Chancellor, however, in the case last adverted to, disclaimed the adoption of any general principle, and professedly decided the case before him upon its own particular circumstances. He thought it better to express his opinion in terms of exclusive applicability to the case, by declaring that under all the circumstances belonging to it, he thought that the appointment was not revoked by the subsequent marriage, and birth of children.

A subsequent marriage and the birth of a posthumous child operate as a revocation.

The case of *Doe v. Lancashire*², was that of a subsequent marriage, and the birth of a posthumous child, and, the point there was, whether the circumstance of the child's being born after the death of the testator, took it out of the rule that marriage and the birth of a child are a revocation of a will. The argument principally relied on against the revocation was this, viz. that at the death of the testator, and before the birth of the child, one of the circumstances which composed a case falling directly within the rule was wanting, and the decision respecting the validity of the will, ought then to be made, as if the question had arisen during the inter-

val between the death of the testator and the birth of his child; the will could not be invalid at the testator's death, and rendered valid by subsequent extrinsic circumstances. Suppose the child had never been born alive, and the marriage and pregnancy had been held to be an implied revocation, all the devises in the will would then have been revoked in favour of a person who never came into esse. The greatest presumption that could be raised from the wife's pregnancy would be an intention to revoke when the child should be born; but a declaration of an intention to revoke a will at a future time was not sufficient even before the statute of frauds; it must be a present intention^a.

But this reasoning was completely met by Lord Kenyon's exposition of the principle of the rule, viz. that it does not so much depend upon the presumption of intention, as on the notion of a tacit condition (5) annexed by legal construction to the will, that in such an event the will should not stand. In support of which may be added also the fiction of law, that the instant the child is born, he is con-

The rule does not depend so much on intention as on the notion of a tacit condition, that in the event of marriage and a child, the will should not stand.

^a Cranwell v. Saunders, Cro. Jac. 497.

(5) A man may make a conditional or contingent will; as where a testator on the eve of going abroad says, "In case I die before I return, I bequeath so and so," the will is avoided by his return. Ambl. 557. Parsons v. Lanoe.

sidered by *retrospect* as born during the parent's life, which doctrine is referible to the civil law from which the rule itself was originally borrowed, and from which it may therefore with propriety receive its explanation (6).

Mr. Justice Grose forcibly observed, that he knew of no argument founded on law and natural justice, in favour of the child who is born in his father's lifetime; that does not equally extend to a posthumous child. And Mr. Justice Buller relied on the cases in our own law, which have decided that a posthumous child is to be considered, as in the same situation as one born during the parent's life. He said that all the cases cited by the council for the plaintiff as well

(6) Vinh. lib. 2 tit. 18. Statim ut editus est testamentum rumpit, et regula ista sic temperanda est si modo postea nascatur, tunc fictione juris, nativitas retrahitur. See the whole passage as produced by Lord Kenyon, 5 T. R. 59. See also what his Lordship observes as to the notice which is taken by *our* law of posthumous children, as where a father dies leaving a daughter, and his wife ensient, and a son is afterwards born, though the lands descend to the daughter in the interim, yet the instant the son is born the descent shifts to him. See Co. Litt. 11. 6. And his Lordship added, that

Statute 10 and under the statute 10 and 11 W. 3, c. 16. the law considered post-
 11 Wm. 3, c. 16. concerning humous children as entitled to take, but the misfortune was that if
 children in vestre there were no trustees to preserve contingent remainders, that which
 sa mere. was good in its inception, might be afterwards defeated by the child's
 not being in esse when the particular estate dropped; but that was
 founded on technical reasoning, because the particular estate failed
 before the remainder could take effect. See the note by Mr. Serjeant
 Williams, to *Purefoy v. Rogers*. 2 Saund. 387. n. 7.

as that of *White v. Barber* (7), established the point that there was no distinction between a child in ventre sa mere, and one actually born. He would add, he said, one to them from 1 Vez. 85, where in a

(7) 5 Barr. 2708, see *Doe v. Clark*, 2 H. Bl. 399. A child in ventre sa mere may take by devise. Com. dig. "Devise" (1). If one devises, in case he leaves no son at the time of his death, to J. S. and dies leaving his wife privement ensient with a son, this posthumous son is a son living at the testator's death, and J. S. is consequently not entitled. See *Sir Rob. Burdett v. Hopegood*, 1 P. Wms. 485. So a posthumous child takes under the statute of distributions, 2 P. Wms. 446. *Wallis v. Hodson*, 2 Atk. 117. Thus also if a power be created for charging lands for portions for younger children living at the father's death, a child in ventre sa mere is a child within the power. *Beale v. Beale*, 1 P. Wms. 244. It is said also that a posthumous child may be vouched, Co. Litt. 390. If the mother takes poison with intent to poison it, and the child is born alive, and afterwards dies of the poison, it is murder by the common law. 3 Inst. 50, 51. As to the intermediate profits, Lord Hardwicke, in the case of *Bassett v. Bassett*, 3 Atk. 203. held, that a posthumous son, claiming under a remainder in a settlement, was by construction of the 10 and 11 W. 3. c. 16. entitled to them: but in the same case he seems to have taken it for granted, that on a descent the mean profits belong to the intermediate possessor; for he directed that the profits of the estate descended should be accounted for by the uncle, only from the birth of the posthumous child. In Co. Litt. page 55, b, Lord Coke says, "If a man seised of lands in fee hath issue a daughter, and dieth, his wife being ensient with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate is lawful, and defeated by the act of God." From which it is to be inferred that Lord Coke did not consider the posthumous child as entitled to any mean profits upon a descent. And Lord C. J. De Grey, in 2 Wils. 526. on a question whether a posthumous son was actually seised, denies

Of children in ventre sa mere, and posthumous children.

bond given on marriage to raise 2000 l. for such child or children of the marriage, *as should be living* at the death of the father or mother, a posthumous child was held intitled to take as coming within the description. Upon these reasons the court gave judgment for the revocation (8).

Both marriage and the birth of a child must concur, and both events must take place *after* the will.

It seems, therefore, upon the above-mentioned cases to be well settled that marriage, and the birth of a child are by operation of law a revocation of a preceding will. And it appears to be with equal certainty settled that both these circumstances must concur to produce such a consequence. In *Ward v. Phillips*, a will was found which gave every thing to the widow. A posthumous child being born, a suit was instituted in the Ecclesiastical Court to set aside the will; and the court having decreed against the will, that decree, on appeal to the delegates was reversed. Dr. Hay, in commenting upon the case observes, that on the side of the first decree it was objected by Dr. Calvert, that as marriage alone

that the posthumous son, in the case of descent, can be entitled to any profits received before his birth, and cites 9 H. 6, 25. as an authority in point. See Mr. Hargrave's note to Co. Litt. p. 11, b.

(8) The Court agreed in disclaiming any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the statute of frauds, which was passed in order to prevent any thing depending either on the mistake or the perjury of witnesses.

did not revoke a bachelor's will, but required the additional consideration of the birth of a child; the birth of a child or children was to be taken as the essential and operative circumstance, and ought to revoke a married man's will; and for this construction he relied on the case of *Jackson v. Hurlock*, before Lord Northington; but that case went no further than to recognize the rule, that marriage without issue did not revoke a will, which rule, said Dr. Hay, was before established by many cases; but it by no means followed from thence that the birth of children would affect a married man's will.

It was further objected, continued the learned Doctor, that in the Roman law, by which we proceed in this court, the birth of children operated as a revocation of a precedent will. This is rightly stated from the Roman law, and it is true that the Roman law in general guides our decrees; but it guides our decrees no further than where it stands uncontradicted by the English law. In the former, children are considered as having a property in the effects of the father, but in our law we know of no such thing, and therefore the effect of the birth of children must be very different (9).

In *Shepherd v. Shepherd*, the case was thus: Shepherd, the testator, after some small legacies to

(9) See Doctor Hay's judgment in *Shepherd v. Shepherd*, 5 T. R. 51, in note.

his collateral relations, made his wife his residuary legatee. After this will, his wife was brought to bed of a daughter in 1763, upon whose birth the testator added a codicil to his will, whereby he directed that the legacies should be paid, and that an annuity of 300 *l.* should be secured upon the residuum, and paid to the daughter. The codicil and will were found together. In 1765 another daughter was born, and in 1768 a son, who was a posthumous child, the testator having died about six months before his birth. These two last children being unprovided for, a suit was commenced in Equity, to set aside the will, and to decree an intestacy. And the question on the case sent out of Chancery by Lord Camden, for the opinion of Sir George Hay, Judge of the Prerogative Court, was, whether the subsequent birth of children was a revocation of the will. That learned civilian, after stating it to be an incontrovertible position settled by an abundance of cases that marriage alone will not revoke, held that so the birth of children alone would not, unless under very special circumstances; and accordingly decreed the probate to the executor.

Upon the whole, therefore, it appears that the doctrine as expressly laid down in *Lugg v. Lugg*, before mentioned as the first of this class of cases, viz. that where the revocation depends upon the alteration in the testator's circumstances, it must be a *total* alteration, has prevailed through all the subsequent cases. And that *total* alteration is made to consist

in the combination of the two facts of marriage and the birth of a child or children.

But Dr. Hay, in the above-mentioned case seemed also to think that there might be such a *total ignorance* in a testator of his real situation as might occasion some doubt; according to the case put by Cicero, in his *de Oratore*, and which has before been mentioned as applicable to our law on the same subject: *Pater credens filium suum esse mortuum, alterum instituit hæredem, filio domo redeunte, hujus institutionis vis est nulla.* But it has also been before observed that by the Roman law the children were considered as having a sort of inchoate property in the effects of the parent. Unless the testator shews by the context or expression of his will the existence of such a total mistake or ignorance, or professedly grounds his testamentary disposition upon facts which he can be shewn to have mistaken, it should seem very strong to say since the statute of frauds and perjuries, that any extrinsic evidence can be admitted to prove the intentions of the testator for the purpose of *overthrowing* his will (10). Where the

(10) The inquisitive reader will find the subject of the admissibility of extrinsic evidence to controul or explain written instruments treated of much at length in the introductory chapter to my book, on the statute of frauds. And particularly as to the relief against mistakes, in Part 4, of Chapter 1. to the authorities on which subject there cited may be added, 2 Freem. 173. 1 Sid. 328. Browning v.

will itself coupled with the facts shews the mistaken apprehension on which the devise has been grounded, the case falls within the principle of *Campbell v. French*, already cited¹. And to a case so circumstanced perhaps the principle on which Lord Kenyon seemed in great part to ground his opinion in *Doe v. Lancashire*, may seem to apply; for there appears to be a sort of tacit condition annexed to, or accompanying, in legal consideration, such a devise, that if the facts were otherwise than apprehended by the testator, the devise should not stand.

PART XVII.

Accident and Surprise.

THERE may be something also in the circumstance of a testator's being prevented by surprise, or even

¹ 3 Vez. Jun. 321.

Wright, 2 Bos. et Pull. 26. *Harwood v. Wallis*, 2 Vez, Jun. 195. *Young v. Young*, 1 Dick. 295, 303. 5 Vez. Jun. 596. and Sir J. Mordaunt *v. Frederick*, in Mr. Sugden's Appendix to his Law of Vend. and Purch. No. 7.

by a sudden accident, when coupled with other particulars in his situation, indicating the probability of an intended revocation, which may be allowed to operate a revocation of his will. *Wells v. Wilson*^a, determined at the Cockpit in 1756, on appeal from the West Indies, lends support to this supposition; which case was as follows:

A. wrote his will on one side of a sheet of paper, but neither signed or sealed it. On the other side he wrote another will, and signed and sealed it. They appeared to be both written at the same time, though it seemed impossible to determine which had been written first. There was a trifling difference. He had provided for the infant then in ventre sa mere, and who afterwards was born in his lifetime. Sometime after this A. died, leaving his wife ensient with a child which was afterwards born. The question was, whether the will was thereby revoked as the posthumous child was entirely unprovided for. Evidence was produced to shew that in his most serious moments he had declared that he had made no will, but was resolved to do so on the first opportunity, mentioning that the situation of his family required such precaution.

While he was in this state of mind, he had the misfortune to receive his death wound by a fall from his horse, and in the short interval between the fall

^a Cited by Sir Geo. Hay, in *Shepherd v. Shepherd*.

and his death, his thoughts were employed on the making of his will ; and accordingly he sent for a professional person, but losing his senses and dying soon after, the paper was all that was found. The great doubt with the court was, whether the will was prior or posterior to the paper written on the back of it. And in order to come at this, they adjourned the case for six months, that they might enquire further as to that fact. But this enquiry was fruitless ; and therefore the Court directed that it should stand for argument on its particular circumstances. And at length, the Lords of the Council, upon a view of the whole matter, and the co-operating argument of a child's being then unprovided for, set aside the will. The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that and the frequent declarations of the testator ; the state of his mind ; and his repeatedly declared intention in the interval between the fall and his death."

This is the manner in which the judgment in that case is accounted for by the learned Judge of the Prerogative Court, in *Shepherd v. Shepherd* : he seems, however, to have omitted that circumstance in the case, without adverting to which, the propriety of admitting the evidence of declared intention, seems palpably open to the objections arising from the statute of frauds, viz. the suddenness of the accident, which was a surprise upon those intentions so natural under the circumstances of the testator's

family to have existed in his mind, and afforded a foundation for the reception of that testimony, which, without such a foundation, has always been rejected by the better opinions. A case of this sort is mentioned in the first volume of Roll's Abridgment^b. A. made his will, according to the statute and afterwards revoked it by parol, and then declared his intention to alter it when he came to D., but before he could come to D. was murdered; the will was held to be revoked.

PART XVIII.

Effect of a woman's marriage upon her will.

ALTHOUGH marriage, and the birth of a child must both happen to revoke the will of a man, yet it has been settled that a woman's marriage alone will be a revocation or rather countermand of her will, if she dies in her husband's life-time (1). This was so determined in the case of *Forse v.*

The marriage of a woman after making her will is alone enough to revoke it, without the birth of a child.

† 614.

(1) If a feme sole surrenders to the use of her will, and marries; her marriage is a revocation, or at least a suspension of the surrender. Ambler. 627.

Hembling, in Coke's Reports^a. It was objected that although after the marriage, the wife could not revoke her will, (*quod fuit concessum per totam Curiam*), yet that was no reason why the marriage should be a countermand: for, it was said, that if a man of sound memory made his will^b and afterwards became non compos mentis, he could not countermand his will, and yet such his disability was no countermand.

But the court were unanimous that the marriage and coverture at the time of the death, was a countermand, and that for several reasons. 1st. The making of a will is but the inception of it, and it does not take effect till the death of the devisor; but it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; and therefore the taking of a husband, shall amount to a countermand at law.

But when a man of sound memory makes his will, and afterwards by the visitation of God, becomes of unsound memory, (as every man for the most part before his death is), it would be hard, indeed, if this act of God should be a revocation. 2dly. It would be mischievous to women, if their wills, after their marriage, were to stand irrevocable. And this they must be, unless the marriage were a revocation, for the law will neither allow a will to be made or revoked

^a 4 Rep. 61. a.

^b 1 And. 181, Godsb. 109.

by a feme covert, because both might then be done by the constraint and coercion of the husband.

It was said by Manwood, in Plowden's Commentaries^c, that if a feme sole makes her will the 1st day of May, and gives land thereby, and afterwards on the 10th day of May she takes husband, who dies on the 20th day of May, and the woman dies on the 30th, the devise is good ; for it could not take effect until her death, at which time she was discovert, as she was at the time of making her will ; and the intermarriage should not countermand that which was of no effect in the life-time of the husband. Which proposition was not denied. And it is observable that in the above-mentioned case of *Forse v. Hembling*, where this position of Serjeant Manwood is cited, no disapprobation of it was intimated by the Court ; and the judgment in that case is expressly grounded not only on the marriage of the testatrix, but also on the circumstance of her dying covert baron. And though in *Cotter v. Layer*^d, it was said by Lord Chancellor King, that a woman's marriage alone, without any qualification, was a revocation of her will, yet that opinion being grounded entirely on *Forse v. Hembling*, does not carry the doctrine further.

Whether if she becomes discovert again and dies a widow, the will is revived ?

It seems to have been held, however, in *Mrs. Lewis's case*^e, that a will made by a woman before

^c Plowd. 343. ^d 2 P. Wms. 524. see also 2 Bl. Comm. 499.

^e 4 Burn. Eccl. Law, C. 47.

marriage is so totally revoked by her marriage that it cannot revive on the subsequent death of her husband. And it is to be observed, that though in *Doe v. Staple*^f, none of the Judges pronounced a decided opinion on the point whether a will by a feme sole revoked by her subsequent marriage, would have its validity restored to it by the wife's surviving her husband, yet the language used by Lord Kenyon, is rather on the negative side ; for his Lordship's words are, that " the will of a woman made before coverture ceases to be her will afterwards ; because it is of the *essence* of a will that it should be valid during the remainder of the testator's life. Therefore, generally speaking, the will of a woman ceases to have any operation after she becomes covert." That learned Judge does not say " during coverture," nor does he add, " if she dies during her coverture ;" but his words express the proposition in as unqualified a sense as those of Lord Chancellor King. And, indeed, in the reason he gives is comprehended something like a negation of any such revival of the will by the death of the husband, for if it be of the *essence* of the instrument that it should be always valid, (and it is not valid during the coverture, as has been before shewn, because not revocable) then it should seem to follow as a clear consequence, that what destroys the *essence* must be a total destruction of the thing itself, so as to leave it no potential existence.

^f 2 T. R. 684.

The counsel in Mrs. Lewis's case, which was before the delegates, cited many authorities from the civil law to shew, that among the Romans, if a man made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But this was answered by adverting to the difference between a voluntary act, and an act of compulsion. And the will was adjudged not to be good. So that the weight of authority, and perhaps of principle, seems to be against holding the will of the feme sole, revoked by her subsequent marriage, to be restored to its operation by the wife's surviving her husband.

A married woman may be capacitated under a power created by way of legal use to make her will notwithstanding her coverture, and her will operates as an appointment of the use; but still in its own nature, it is a will, with the properties and incidents of a will, and is accordingly revocable as such, as has been more fully spoken to in a former part of this essay.

It has been sometimes considered doubtful whether a power given to a feme sole was not suspended by her marriage^a; but the law seems now to be understood as settled, that a feme covert may execute a power given to her while sole. However, where an agreement before marriage was en-

A married woman may execute a power given to her while sole.

^a § Bro. P. C. 908, Rich v. Beaumont.

tered into, that a settlement should be made of the wife's estate, reserving to her a power of disposing of it by will; and before the marriage she devised it in favour of the intended husband, who survived her, the will was nevertheless held to be revoked. For the agreement was for an authority to be exercised during the marriage, and therefore could have no operation in preventing the consequence of law, with respect to what was done before the marriage^a.

PART XIX.

Of the revocation of wills of personal Estate.

WITH respect to the revocation of a will of personal estate, the statute of frauds^a is express, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing

^a See *Doe v. Staple*, 2 T. R. 684, and see the same point ruled in Equity, in *Hodgson v. Lloyd*, 2 Bro. C. R. 534.

^a 29 Car. 2. c. 3. s. 22.

thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at least. But it is not made necessary that such a revocation by parol, when committed to writing, should be signed or attested. And, where a man by will in writing devised the residue of his personal estate to his wife, and upon her dying in his life-time, made another disposition of the residue by a *nuncupative* codicil, this was resolved to be good, for by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue ^b.

Implied revocations of wills, and testaments of personal estate, fall in general under the same doctrine, and are subject to the same principles and rules as those which have governed the decisions in respect to property in land. But there are also some distinct considerations which apply to legacies in particular.

Where a parent makes provision for a child by his will, and afterwards gives to such child a portion in marriage, if a daughter, or pays a sum for establishing him in the world, if a son, the legacy is held in general to be adeemed ^c. But not so if the provision made in the parent's life-time, be not of the same kind with the legacy^d, or be subject to a *recon*

*Of ademption
of legacies.*

^b 1 Abr. Eq. Ca. 408. and see 4 Barn. Eccl. L. 203.

^c 1 P. Wms. 681, Hartop v. Whitmore.

^d 1 Bro. C. C. 425, Grave v. Earl of Salisbury.

Wherever the subject of a specific legacy is withdrawn, the legacy must fail.

The distinctions as to what is specific and what is general have run into great subtlety.

tingency^e, or if it be made expressly in satisfaction of another claim^f, or if the two gifts be upon different terms^g. Where the subject of a specific legacy is withdrawn, the legacy must fail, but there are many nice, and some, as it should seem, over-curious distinctions as to what, to this effect, shall be considered as *specific*. Where a sum of money has been bequeathed out of a particular fund, it has for the most part been considered as a general legacy, or *legatum in numeratis*, so as to entitle the legatee, if the testator receive it in his life-time, to have it made good out of the general effects^h. But other cases have been decided a different wayⁱ.

The Courts on this subject have run into such nicety as to adopt distinctions between a bequest of a sum of money due on a bond from A. and a bequest of such debt generally, holding the legacy in the former case to be pecuniary, and in the latter to be specific^k. And a difference has sometimes been taken between a voluntary and compulsory payment of a debt after a bequest of the same; considering the voluntary payment as not indicating any change of mind in the testator, and therefore not an ademption, while the payment by compulsion has

^e 2 Atk. 491. ^f 3 Bro. C. C. 192. ^g Id. Ibid.

^h 1 P. Wms. 777, *Savile v. Blacket*, 4 Bac. Abr. 355.

ⁱ 2 Fonbl. 367. note (†).

^k 2 P. Wms. 330, *Rider v. Wager*, and n. 1. and see 2 Bro. C. C. 111, 1 Eq. C. Ab. 302.

been looked upon as an active step taken by the testator, in derogation of his own gift¹. But this distinction has been denied in other cases(1).

A conversion or specific alteration of the thing bequeathed, as making a raw material, after giving it by will, into a manufactured article, has been held a clear revocation^m. So if stock be bequeathed and afterwards sold outⁿ: but if the same exact quantity be repurchased by the testator the legacy is not adeemed^o. And it has been held that if, after bequeathing a debt, the testator receive dividends under the bankruptcy of the debtor, the legacy is not thereby revoked^p.

¹ 2 P. Wms. 330, n. 1.

^m 2 Bro. C. C. 110.

ⁿ Ibid. ^o Ca. Temp. Talbot, 226.

^p 2 Bro. C. C. 108. *Asburner v. Macguire*.

(1) 4 Bac. Abr. 355, n. (b) but see 2 Vez. jun. 640, *Coleman v. Coleman*, where this distinction has been admitted as a strong circumstance from which to gather the intention, though not as an absolute or decisive ground.

PART XX.

Satisfaction in Equity.

I SHALL here add a few words on the equitable doctrine of satisfaction, as having an affinity with my present subject, without presuming to enter at large into the consideration of the cases, which would greatly multiply my labour without much profit to the reader.

Of the distinct meanings of the terms *satisfaction* and *performance*.

This word *satisfaction*, from its frequent and too vague adoption in courts of equity, seems to have introduced no small confusion of ideas, and I venture to question whether it is often used with technical precision. By considering what it is not, we shall perhaps be soonest conducted to the true apprehension of what it really is. Lord Thurlow declared himself to have met with continual disappointment in his attempts to establish a broad and useful distinction between cases of *satisfaction* and *performance*. Since, however, we are forbidden to treat these terms as synonymous, by the rules of construction which have separated them in application, we must not be discouraged, even by his lordship's disappointment, from attempting an approach at least to some practical grounds of discrimination.

To the class of cases called cases of *performance*, as far as the decisions appear to have gone, those seem properly to belong, wherein a man being under a covenant to do something which is to take effect after his death, does an act in his life-time, or leaves a consequence to arise after his death, which virtually includes, or is, *in substance*, the thing intended. Thus in *Blandy v. Widmore*^a, where a man covenanted to leave his wife 620*l.* and died intestate, and the wife's distributive share came to more than 620*l.* and in *Wilcocks v. Wilcocks*^b, in which a man on his marriage covenanted to buy lands of the value of 200*l. per annum*, and to settle them by way of strict settlement, and afterwards purchased lands of that value, but made no settlement, and died, and left the purchased lands to descend to his eldest son, the eventual benefit in both these cases operated as a presumed *performance*, and not as a *satisfaction* of the engagement^c. It is true, that in *Wilcocks v. Wilcocks*, the eldest son took by the event a fee simple instead of an estate in tail, but he was not the person to take an objection on *that* ground; and Sir Joseph Jekyll, in observing upon this case^d, declares his opinion, that if the eldest son had aliened the fee, and died without issue, the second son could not have recovered the estate by virtue of the settlement; which observation, if just,

^a 1 P. Wms. 323.

^b 2 Vern. 553.

^c See also *Lee v. D'Aranda*. 3 Atk. 419.

^d 3 P. Wms. 225.

furnishes a strong distinction between a case of performance and a case of satisfaction; for as a satisfaction, it is very clear it could have only bound those (1) by whom the benefit was felt*,

There may be
performance *pro*
tanto.

In cases of this class, though the intention may not be manifested in expression, yet if no contrary grounds of inference exist, the thing intended or engaged to be done being *in effect* performed, the presumption against double portions or provisions prevails†. It seems, indeed, that if the effect of the thing be partly performed, such partial performance fulfils the obligation *pro tanto* in equity: thus where a sum of 30,000 l. was covenanted by a man on his marriage to be laid out in land to be settled on himself for life, with remainder to his first and other sons in tail, and the covenantor died, having laid out only a small part of that sum on the purchase of some land, which he left to descend to his eldest son, Lord Talbot decreed it a performance *pro tanto*‡. So also the rule seems to be, that where a

* Vide *Wilson v. Pigott*, 2 Vez. jun. 355.

† Vide *Weyland v. Weyland*, 2 Atk. 632, *Prince v. Stebbing*, 2 Vez. jun. 409.

‡ *Lechmere v. the Earl of Carlisle*, 3 P. Wms. 227.

(1) The reporter, indeed, adds a query, whether, if the eldest son had died before the next term, so as that he could not have suffered a recovery, the second son ought then to have been barred of his chance under the settlement.

man covenants to do an act, and he does that which may be converted into a performance of his covenant, he shall be presumed in equity to have done it with that intention. Thus where^a one covenanted by his marriage settlement with the trustees to pay to them two several sums, amounting to 2000*l.* to be laid out in land, to be settled to the uses of the marriage, and did not pay the same, but after having purchased an estate for 2150*l.* died intestate, without having made any settlement of such estate, though it was strongly contended, that as the husband had covenanted to pay the money to the trustees, he could scarcely mean a performance when he purchased land himself, yet his honour declared, after admitting that if the case had been *res integra*, he should have thought the reasoning made use of entitled to great consideration, that the case was within the principle of *Lechmere v. the Earl of Carlisle*.

Constructive performance by a collateral act.

But it seems a settled rule, that to constitute a performance, the eventual benefit must correspond in time with the period at which the stipulated benefit was to take place: thus where a testator, being under a bond to leave 300*l.* to be paid in one month after his death, bequeathed a legacy of 500*l.* to be paid in six months, this was held to be no performance¹.

The constructive performance must correspond in time with the stipulated benefit.

^a *Snowden v. Snowden*, 3 P. Wms. 227, in Notis.

¹ *Haynes v. Mico*, 1 Bro. 129, and see *Richardson v. Elphinstone*, 2 Vez. jun. 464.

The true reason of the difficulty which has been so often confessed, of separating cases of performance from cases of *satisfaction*, seems to have arisen from the want of annexing a just idea to the word *satisfaction*, which is, in truth, a term of loose and general signification, according to the use which has been always made of it in courts of equity, and has been adopted popularly to express the final and substantial effect, as well of cases of *performance* as of cases of *election* and cases of *ademption* or *revocation*, which are the terms truly expressive of the means and operations of law, by which that result described by the word *satisfaction* is produced. I hazard the opinion with great timidity and respect, but I cannot help thinking that it will be difficult, if not impossible, to suggest an example of a pure case of satisfaction, if we treat the term as having an exclusive and appropriate sense, and not rather as generically comprehending certain specific varieties of equitable rules and technical consequences.

Satisfaction is the general term, expressing the final effect of performance, election, and revocation

Every case upon a will made by a person under a binding contract, unless it be considered as an actual performance, can only amount to a case of election; for how can a testator by his will forcibly substitute *another* thing in the place of *that* thing which he was bound by his contract to do, or how can such a substitutionary disposition have any other operation than by giving a better thing in lieu of the thing contracted for, to engage and ensure the choice of the devisee or legatee, on highly presumable grounds of

preference? If such a case is termed a case of *satisfaction*, it is because such is the final consequence of an *election*, for it may be presumed almost as certain that where a better is proposed in the place of an inferior benefit, the condition will be accepted. In strictness, therefore, this is a pure case of election, or of *satisfaction working by election* (2).

Payment is performance. Thus where a legacy is bequeathed to a creditor, equal to or exceeding the amount of the debt, the debt is considered as meant to be answered by or included in the gift. This is therefore a *satisfaction by performance*: and while this part of the subject is before us, it may be of importance to remind the reader that there can be no performance *pro tanto* by a *legacy* of a smaller sum, whereas according to the case of *Lechmere v. Lord Carlisle*, above cited, a *covenant* to make a certain provision may be partially satisfied by an inceptive performance.

(2) It is a rule that no one can take under a will, and at the same time do any thing to defeat any of its dispositions. If a man claims by virtue of it he must admit it in toto; but if a will affects to give away, or modify another's right, without bestowing upon him a substituted benefit of equal or greater amount, the person having such right may of course maintain it against the will, though by so doing he gives up all advantage under the will. 1 Vez. 122, Ca. Temp. Talb. 176, 2 Atk. 629, 2 Vez. 628, for references upon the doctrine of election, 9 Vez. jun. 533, N. (a) and see 10 Vez. jun. 589, *Blunt v. Clithero*.

Where a man having granted a benefit or provision by a voluntary and revocable instrument, by a subsequent instrument makes an advancement of some other bounty, or gratuity, by way of provision, to the same object (3), and the circumstances of the case warrant the inference that the second provision was meant to take place of the first, this is not properly a case of satisfaction. A satisfaction it *ultimately* may be, but the true operation of it is to *revoke* or *adeem* the legacy. Neither is the term satisfaction expressive, in any other sense than as a discharge, of its ultimate effect in equity, since a smaller sum given in the life-time may, under circumstances, annul a greater provision by will^k.

But if a legacy of a larger sum can be wholly set aside by the substitution of a less, this cannot be called a performance, still less a satisfaction *by* performance, and less still a satisfaction *by* election; but there seems to be no impropriety or confusion of terms in calling it a *satisfaction*, (meaning only thereby a discharge), *by revocation* or *ademption*. And this phrase is the more appropriate, because it is certainly not in strictness of legal language an *ademption* or *revocation simply*: it is a satisfaction

^k Vide *Hartop v. Whitmore*, 1 P. Wms. 680, *Shudall v. Jekyll*, 2 Atk. 517, *Rosewell v. Bennett*, 3 Atk. 77.

(3) For some useful distinctions on this subject, the reader will do well to look into the case of *Shudall v. Jekyll*, 2 Atk. 517.

working *by way of* revocation, for in truth it operates as a revocation on a principle of equitable presumption¹,

It does not redound much to the accuracy of a science to multiply terms, and apply different rules to them, without first distinguishing between the different ideas to be implied by those terms: and, therefore, until the word 'satisfaction' has a more appropriate and exclusive sense, it will only perplex the subject to talk of cases of satisfaction as distinguished from cases of performance, cases of election, and cases of revocation. The idea which is meant to be conveyed by satisfaction, simply used, is neither descriptive of cases of performance, cases of election, nor cases of revocation. It is not descriptive of *performance*, because it is not used to signify the identical, or substantial, or virtual effectuation of the thing contracted to be done, but the *substitution* of one thing for another. And as there are only two sorts of cases, wherein a *substitution* can take place, viz. where the thing to be done is voluntary, and where it is obligatory or resting in contract, in the former of which cases, the satisfaction operates by *revocation*, in the other, by putting the party benefited to his *election*, the *final* consequence *only* of each operation is properly expressed by the word *satisfaction*, as a sort of genus to which these cases are referible as the specific varieties.

Vide *Ellison v. Cookson*, 1 Vez. jun. 100, 7 Vez. jun. 516.

CHAP. III.

EVIDENCE AND CONSTRUCTION (1)

PART I.

Double Portions.

THE rule prevailing in courts both of law and equity, that external evidence may be received to **REBUT PRESUMPTIONS**, submits the operation of written instruments, more extensively than any principle hitherto noticed, to the controul of extrinsic circumstances^a. In courts of equity, more especially, this allowance has prevailed. The genius of the com-

^a Lamplugh v. Lamplugh, 1 P. Wms. 112.

General rules
for the construc-
tion of wills.

(1) The following general rules respecting the construction of wills seem to be pretty steady in their application. The construction of wills must be the same in courts of law and equity, 1 Bl. Rep. 377. The order of words is not to be regarded, but a transposition may be made to render a limitation or disposition sensible, Hob. 75, Spark v. Purnell, 2 Vez. 82, East v. Cook, id. 74, Duke of Marlborough v. Lord Godolphin, id. 248. In respect to which a court of equity has no more power than a court of law. But this can only be done to come at the meaning of the testator, and not to

mon law inclines it to generality and certainty, and even its presumptions are in some cases too in-

alter or affect the operation of the devise; and it ought never to be done where the words are plain and sensible, much less to let in different devisees or legatees in a will: for to do that would be to make a new will, *ibid.* et *vid.* 2 Leon. 165. And repugnant words may be rejected, 2 Vez. 278, Boon v. Cornyforth, 2 Lord Raymond, 881, Cole v. Rawlinson. The intent of the testator is to be the rule of construction if the words will bear it out, but if the force of the words be such that the intent cannot be complied with, the rule of law must take place, 2 Vez. 248, Brownword v. Edwards. And wills should be so construed as to preserve estates in the intended channel of descent, Cro. Jac. 185, 1 Leon. 285, 2 Vez. 615, 2 Str. 798. The same words of a will may have a different force as applied to different subjects or descriptions of estate, 1 P. Wms. 668, Forth v. Chapman, 2 Vez. 616. Effect ought to be given, if possible, to the whole will, and a codicil is to be considered as part of it, 3 Vez. jun. 105, Gray v. Minethorpe; and a construction may be made to support the intention upon the whole will even against strict grammatical rules, 11 Vez. jun. 148. An express disposition cannot be controlled by inference, 1 Vez. jun. 269, Collett v. Lawrence. Words of desire are of imperative obligation, if the object be certain, Prec. in Ch. 200, Eccles v. England, 1 Bro. C. C. 142, Harland v. Trigg, 2 Bro. C. C. 38, Pierson v. Garnett; unless there is plainly a discretion intended to be given, Ambl. 686, Canliffe v. Canliffe, 10 Vez. jun. 522, Morrice v. the Bishop of Durham. If a testator uses technical phrases he must be supposed to understand them, unless by other parts of the will he manifests the contrary, 3 Bro. C. C. 60, Phillips v. Garth, 1 Bro. C. C. 31, Green v. Howard, 3 Bro. C. C. 234. And, *prima facie*, words must be understood in their *legal* sense, unless a contrary intent plainly appear, 5 Vez. jun. 401, Holloway v. Holloway. If a testator expresses himself incorrectly the court will supply proper words, if the meaning appear, 3 Bro. C. C. 404, Dodson v. Hay, Doe d. Leach v. Mecklem, 6 East. 486. General words will be con-

flexible to be disproved. But equity, as its rules are framed more for particular than general relief,

troubled to render the whole will consistent, 6 Vez. jun. 129, *Whitmore v. Trelawney*. Where there is no connection by grammatical construction, or by direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, though in its general terms and import it may be similar, and apply to persons standing in the same degree of relationship to the testator, 9 East. 267, *Wright ex dem. Compton v. Compton*. In trying the meaning of phrases used in a will all circumstances may be looked at, in which the court might have been called upon to determine the meaning of the same phrases applied to a different state of facts, 11 Vez. jun. 457, *Earl of Radnor v. Shafto*.

Every word ought to have an effect if possible, and not inconsistent with the general intention, which if manifest is to controul, Roll. R. 319, *Blandford v. Blandford*, 6 Vez. jun. 100, *Constantine v. Constantine*. The general words of a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense, 2 Burr. 912, *Strong v. Teate*, and 8 T. R. 118, *Doe on dem. Reade v. Reade*, which last case may be added to the note in page 71, as illustrative of the point there adverted to. Where there are two inconsistent devises in the same will, Lord Coke says the *last* shall prevail: *cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est*, Co. Litt. 112, b. Plowd. 541, but the authority of this position has been much contested, see Mr. Hargrave's note on this passage. In every will there is a tacit condition both in law and equity, that whoever would derive a benefit under it must acquiesce in the whole of it, however disjointed the parts, 1 Bl. Rep. 377, *Molyneux v. Scott*.

Croke, Justice, laid down three rules which, he said, if observed would open all the doors in every will: 1st. No will ought to be construed per parcella but by the entirety; 2d. No contrariety or contradiction to be admitted; 3d. No negation, nor any thing negatory ought to be in a will; 2 Bulst. 178.

allows all its presumptions to be repelled by opposite testimony, and by testimony of every kind.

The same word in the same will should be construed in the same sense, 2 Ch. Ca. 169, *Whitmore v. Lord Craven*. It is an ordinary rule that where a former clause in a will is *express, positive, and particular*, a subsequent clause shall not enlarge it, Barn. C. R. 261, *Roberts v. Kiffin*; nor shall any argument or inference be made from the other parts of the will to controul it, 8 Vez. jun. 42, *Jones v. Colbeck*. Constructions of wills shall be made according to estates at common law by *deed*, unless something in the intent of the will appear to the contrary, Carth. 5, per Bridgman, C. J. cites 6 Rep. 16, *Wild's case*. Wills in general are construed from the *making*, unless circumstances, or the tenor of them, shew that the construction should be from the *death*, but the *intermediate* time is not to be regarded, 1 Vez. 295. Mistakes in a will are never to be supposed, if any reasonable construction can be found out, 1 Atk. 415, *Purse v. Snaplin*. Trustees always take a fee under a will, where the purposes of the trust cannot otherwise be answered, 1 Vez. 491, *Gibson v. Lord Mountford*. The intention of a testator must be construed in consistency with the rules of law, so as not to be considered as intending to limit a fee upon a fee; or to create a perpetuity; to make a chattel descendible to heirs; to put the freehold in abeyance; or to prevent a tenant in tail from suffering a recovery, Dougl. 341, *Hodgson v. Ambrose*.

If words admit of a two-fold construction, the rule is to adopt such as tends to make good the instrument, even in the case of a *deed*, much more of a *will*. The intention of a testator is not to fail because it cannot take effect to the full extent, but it is to work as far as it can. A will is not to be controuled on account of an unmeritorious object; nor does the amount of property, nor the want of prudence in the disposition afford a fair ground for controuling a will, 4 Vez. jun. 312, 313, 329, 340, *Thelluson v. Woodford*. A *videlicet* shall be rejected if repugnant, not if it can be reconciled and made restrictive, 3 Vez. jun. 194, *Wilson v. Morent*, id. 65, *Rumbold v. Rumbold*.

Presumption
against double
portions.

Thus it is a settled rule of presumption in equity, (borrowed from the civil law) that if a father gives a legacy to a child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy. This presumption was opposed in *Ellison v. Cookson*^b, by extrinsic evidence, consisting of declarations and correspondence, which were admitted on the above doctrine

^b 1 Vez. jun. 100.

Where the whole property is given with a particular interest out of it, it operates by way of exception out of the absolute property; and where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, and when he shall be of age then to him and his heirs, the rule is that it shall not operate as a condition precedent, but as the description of the time when the remainder-man is to take in possession, 1 Burr. 228, *Goodtitle v. Whitby*, 3 Rep. 16, *Boraston's case*, 3 T. R. 41, *Doe v. Lea*, 6 Vez. jun. 239, *Hanson v. Graham*. 9 Vez. jun. 229, *Lane v. Goudge*.

'And' must be read as 'or,' where it is necessary, to put a reasonable construction on the will, 2 Atk. 643, *Read v. Snell*, 1 P. Wms. 434, and note 2, 3 Atk. 86, 193, 408, or where it is necessary to give effect to all the words, 7 Vez. jun. 459, 3 Vez. jun. 450, 6 Vez. jun. 311. So 'or' is sometimes to be read as a copulative, Cro. El. 525, *Pollexfen*, 645, 2 Str. 1175, 3 Atk. 390, 1 Wils. 140, 9 East. 366, 6 Vez. jun. 341, and a disjunctive at the end of a period shall not disjoin the preceding sentences, if the intent is against it, 3 Atk. 391, 12 Vez. jun. 112. Notwithstanding all the parties under a will may be volunteers, it is not necessary that the words should be taken as they are, but they may be varied, 2 Atk. 576, *Bagshaw v. Spencer*. But it is an universal rule, that words having an *obvious* construction, are not to be rejected upon a suspicion that testator did not know what he meant, 5 Vez. jun. *Milnes v. Slater*.

of receiving parol evidence against presumptions; though, as in the opinion of the court, the evidence when received did not with sufficient clearness demonstrate any intention of the testator opposed to the presumption, the presumption prevailed. In *Debeze v. Mann*^c, (which, indeed, was the case of a father and putative child, but the legacy being *expressed* to be for a portion it came up to the principle upon which the presumption is founded in the case of a general legacy by a lawful parent) (2) the presumption was repelled by parol evidence of words used in conversation, clearly importing a design to better the child beyond the extent of the advancement, and because there was no way of carrying into effect such design, but by construing the legacy to be unadeemed.

PART II.

Debts paid by Legacies.

IT is also a rule of presumption well established in courts of equity, that where a legacy is given by

^c 2 Br. C. R. 165.

(2) The cases of a natural child, vide *Grave v. Lord Salisbury*, 1 Bro. C. R. 425; and of uncle and niece, vide *Shudall v. Jekyll*, 2 Atk. 516, are said to be out of the rule.

a debtor to his creditor, exceeding or equal to the amount of the debt, it is a satisfaction of the debt. This rule of presumption, though established, is met by another, viz. that every bequest is *prima facie* a benevolence (1); on which ground the courts have of late viewed it with great jealousy, and have shewn a very ready disposition to take cases out of it, wherever any thing could be collected from the will, indicative of a contrary intention in the testator (2).

Of the opposite influences of the conflicting rules—that a debtor is not to be presumed to make a gift to his debtor, and, that legacies imply a bounty.

(1) See the remark of Lord Chancellor Talbot in *Fowler v. Fowler*, 2 P. Wms. 353, and of Lord Hardwicke in *Richardson v. Greese*, 3 Atk. 68, who there says, that the maxim of *debitor non presumitur donare* would not hold, if it were to be reconsidered. And again, that “legacies naturally imply a bounty.” And observe what was remarked by Lord King, in reversing the decree of the Master of the Rolls, in *Chauncey’s case*, 1 P. Wms. 410. Lord Alvanley called it a very absurd rule, 3 Vez. jun. 466.

(2) I do not undertake to enumerate all the circumstances which will take a case out of the operation of this rule of presumption. The following, however, are the most prominent. Where the payment of debts is particularly mentioned in the will, 1 P. Wms. 409, *Chauncey’s case*. If the legacy is contingent, 2 Atk. 491, *Spinks v. Robins*. Postponement of the period of the payment of the legacy, 3 Atk. 96, *Clarke v. Sewell*, 2 Atk. 300, *Nicholls v. Judson*. Uncertainty as to duration or commencement, 2 Vez. 635, *Matthews v. Matthews*. The subject of the debt and legacy not being *ejusdem generis*, 7 Bro. P. C. 12, *Broughton v. Errington*, 2 P. Wms. 614, *Eastwood v. Vincke*. Where the debt is incurred after the date of the will, *Salk. 508*, *Cranmer’s case*, 2 P. Wms. 341, *Thomas v. Bennett*, 3 P. Wms. 354, *Fowler v. Fowler*. Where the legacy is to a servant, 3 Atk. 69, by Lord Hardwicke.

But notwithstanding the strong disposition of the courts to bound the application of this rule of presumption, parol evidence has been refused by great chancellors to be admitted to take a case out of its operation. Thus in *Fowler v. Fowler*^a, Lord Talbot, after having at the same time declared his disapprobation of the maxim and his apprehension of the danger of attempting to alter it, observed that, though in some cases (3) parol evidence had been allowed, in order to shew that the testator designed to give the legacy exclusive of the debt, yet his opinion was against admitting such evidence, for then the witnesses and not the testator would make the will. And in *Richardson v. Greese*^b, Lord Hardwicke, after remarking that the court had always shewn itself dissatisfied with the rule, and had been fond of distinguishing cases out of it; observed that these distinctions were not to be taken from particular circumstances *dehors* the will, but must be found in the will itself.

Whether the rule is a rule merely of presumption or of settled and fixed construction, seems to be the true question upon which these decisions turn; for where a positive rule of construction is established

Of the distinction between presumptions and positive rules of construction.

^a 3 P. Wms. 353.

^b 3 Atk. 60.

(3) This had been positively so adjudged 30 years before in *Cuthbert v. Peacock*, 2 Vern. 593.

by the maxims or practice of the court, the instrument to which such positive rule of construction applies, becomes incapable of any other sense or operation, so that to oppose such construction, is to contradict the instrument itself; and this seems to have been the true reason of the decision in *Brown v. Selwyn*. If, therefore, this presumption of a legacy's being a satisfaction of a debt, could be shewn to be established upon a technical and positive rule of *construction*, a sufficient reason would appear for the rejection by the courts of all extrinsic evidence to oppose its operation, however easily such an odious rule might give way to opposite inferences arising out of the context and apparent design of the instrument itself.

In the case of double portions, when the testator subsequently advances the legatee, the *presumption* is not connected with any rule of *construction*, since the will is in that case not affected by construction, but, *pro tanto*, *revoked*, by a presumption arising entirely out of an act of the testator *dehors* and *posterior* to the will: but where a legacy is presumed a satisfaction, the will has an *operation* and *construction*, though by being made to act upon a sum already due to the legatee, the benefit, *prima facie* intended, is lost.

PART III.

Double Legacies.

Where the same thing is given to different persons by the same instrument, the decisions must necessarily turn *wholly* upon construction. And though the rule of construction is differently stated by very high authorities (1), some considering the last bequest as revoking the first, others regarding both as co-operating to effect a joint-tenancy, and others again regarding them as rendering each other void for uncertainty; yet I conceive, that, which ever of these opinions be right, parol evidence is to have no share in determining the operation. But the question is opened again, if we advert to the case of two legacies to the same person by *different* instruments, in which the rule of construing the bequests accumulative, seems to rest upon a slight foundation^a, and to be easily repelled by *internal*

Double legacies
by the same in-
strument.

By different in-
struments.

^a James v. Semens, 2 H. Bl. 213,

(1) See the opinions on this point collected in the margin of the English Plowden, 541, and see P. 430 of this book, in the note.

evidence. But it is still a matter of enquiry, how far extrinsic evidence can be received for this purpose^b.

In *Barclay v. Wainright*^c, his honour referred it to the master to enquire, whether the several persons, legatees by the first codicil, to whom *no* legacies were given by the second, were dead or not in the service of the testator at the date of the second codicil, and such facts were received for the sake of assisting and elucidating the internal evidence, by shewing that the omission of certain legatees named in the will, did not spring from any new intention of the testator.

State of the doctrine as to the presumption of the courts in the cases of double legacies, in the same and distinct instruments.

The same judge, in a case of double legacies, which afterwards came before him^d, upon the question whether the parol evidence could be admitted, observed, that “if it is an established rule that two legacies are accumulative where they are given by different instruments, he could not raise a presumption by evidence against it, and he was inclined to think it must be taken to be a rule.” The rule was also laid down in *Ridges v. Morrison*^e, by Lord Chancellor Thurlow—“that where a testator gives a legacy by a codicil as well as by his will, whether it be *more, less, or equal*, to the same person who is legatee in the will, it is an accumulation.” The

^b See *Cliffe v. Gibbons*, 2 Lord Raym. 1324.

^c 3 Vez. jun. 462.

^d *Osborne v. Duke of Leeds*, 5 Vez. jun. 269.

^e 1 Bro. C. C. 389.

same chancellor adds, that it is incumbent upon the executor to produce *evidence* to the contrary, if he contest such accumulation. But the *species* of evidence to which his lordship afterwards adverts, is wholly internal, and arising out of the context of the instruments. The rule as laid down in the case just alluded to, was adopted from *Hooley v. Hatton*, (see the note at the end of the case of *Ridges v. Morrison*,) which case of *Hooley v. Hatton*, Lord Thurlow observed, was examined with abundant care, and he accompanied that observation with a remark, that it was unnecessary to repeat the cases after reading the very able opinion of Mr. J. Aston, which, he said, contained the whole doctrine of the law upon the subject.

The state of the presumption, according to the varying circumstances of the case, seems to be settled by the result of the authorities upon the following criteria, viz. where the same *specific thing or corpus* (as a diamond ring, where the testator has but one) is twice given to the same person, either by the same instrument, or by different instruments, there in the nature of the thing, it is but a repetition.—Where the same *quantity* as 100*l.* is twice given by the same instrument, the presumption *simpliciter* is against the legatee:—But where the same *quantity* is given by the same instrument with any additional cause assigned for it, or with any material circumstance of variation accompanying the second gift, the presumption is turned against

the executor in favour of the accumulation.—Where equal sums are given in two *distinct* writings, or a larger after a less, or a less after a larger, the latter gift is construed an accumulation.

But though the presumption in a case, wherein two legacies of the same sum or quantity occur in distinct instruments, leans against the executor, yet it is only a presumption *simpliciter*, and is turned the other way where the same cause is expressly assigned in both instruments for the gift without any additional reason^f.

And it seems also, according to Lord Hardwicke^g, that where in a distinct instrument a *larger* legacy is given to the same person, assigning, in *totidem verbis*, and with a perfect identity, the same cause which was expressed in the former instrument, this shall not be a double legacy; with which position, Aston J. in *Hooley v. Hatton*, appears to agree, and the same doctrine seems to be held by Lord Thurlow in *Ridges v. Morrison* above cited, and is stated to be the rule by *Menochius*^h.

Whether parol evidence is admissible to determine this question?

It is to be remarked, that in the above mentioned case of *Hooley v. Hatton*, which is a very leading authority, no idea appears to have been entertained of the admissibility of parol evidence. Mr. J. Aston

^f *Menochius de presumptionibus*, lib. præs. 128, num. 4, 13, 14, and see *Swinb.* part 7, c. 20, fol. edit. 550. ^g 2 *Atk.* 640.

^h *Lib.* 4, præs. 128, and see *Swinb.* 4to edit. 291.

opened with observing, that in the case before him, there was no *internal* evidence, therefore, he must refer to the general rule of law. And the Lord C. B. Smythe observed, that "the intention is the clearest rule, but it is admitted on all hands, here is no *internal* evidence, we must therefore refer to the rule of law." And lastly, by the Lord Chancellor Bathurst, it was said, that "no argument could be drawn in the case before him from *internal* evidence, they must, therefore, refer to the rule of law."

What Lord Thurlow's opinion was, as to the admissibility of parol evidence, does not expressly appear in the above-mentioned case of *Ridges v. Morrison*, but it is to be observed, that in illustrating his remark "that slight circumstances may operate in proof of the testator's intention," he specified such only as could be collected from the context of the instruments. And in *Campbell v. the Earl of Radnor*¹, the decision turned upon the words of the instruments. But in *Coote v. Boyd*², the point respecting parol evidence came directly under adjudication, in which Lord Thurlow laid down the rule thus, "the question, whether by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption *donec probetur in contrarium*, and will let in *all sorts* of evidence." And the same chancellor further observed, (what the temper of later decisions seems inclined to adopt, as the true and practicable

¹ 1 Bro. C. R. 271.

² Bro. C. R. 521.

distinction) that “*where the question arises upon the construction of words simply, qua words, no evidence (i. e. extrinsic evidence) can be admitted.*”

Whether his lordship would have been ultimately governed by these maxims, if the decision of the case had depended upon it, cannot be known, since the case was determined upon the *internal* evidence of the will and codicil themselves. It was much contended, that it was a case of presumption, and that *all* presumptions were open to be encountered by parol evidence.

PART IV.

General Doctrine.

It seems to be Lord Thurlow's doctrine that all sorts of evidence are admissible to rebut presumptions, and even that constructive operation of

UPON the whole, the distinction, according to Lord Thurlow, seems to be this: that *all sorts* of evidence are admissible, with different degrees of weight and value, to rebut presumptions of equity(1), and even that constructive operation.

(1) It has long been fully settled, that parol evidence is admissible to rebut a resulting use, Lord Altham & Earl of Anglesea, 2 Salk. 676, see also *Roe, lessee of Roach v. Popham* and others, Dougl. 2.

of an instrument which is referible to presumption; but that where the question arises upon the construction of words, *qua* words, no extrinsic evidence can be admitted; still less can it be received to controul a technical rule of verbal construction.

an instrument, which is referible to presumption, with different degrees of force: but not where it is a question as to the construction of words, *qua* words, or as to the effect of limitations, or technical expressions.

There are some equities arising upon written instruments, the strict and technical nature of which seems to place them clearly out of the reach of parol evidence. I mean those which do not arise out of the presumable intention, or the moral and conscientious relations of parties; but out of an artificial system of jurisprudence, the maxims of which can be neither steady nor clear unless pursued to their consequences, and kept uniform in their application. This observation holds especially with respect to the rules which govern the succession to property; to which some equitable canons apply, of a merely *positive* nature, and which are grounded on accident and habit, rather than principle or presumption. Such appears to be the rule which favours the real representative, by applying the personal estate in exoneration of the land though *expressly* charged by the testator—a rule derived to us from the ancient policy of our ancestors, which has impressed on the law of landed property, its inveterate preferences in favour of the heir whom it was anxious to qualify with the means of sustaining the duties of the feudal relation. Though it may be observed that the abolition of the feudal tenures, and the growing interests of commerce, have made the courts very

ready to take cases out of a rule, which is considered as not agreeable to the situation of the times. Still, however, it is left standing, and though living in dishonour, is of general obligation in courts of equity.

So too, the rules which apply to and modify the titles to real and personal property, (wherein the courts of equity hold a perfect agreement with courts of law) as, for example, such as concern the rights of representation and administration, the quantity of estates expressed by certain legal idioms, the compass and effect of limitations, and the descriptive force of technical expressions (2),

Of the rule in
construing a be-
quest to rela-
tions.

(2) That parol evidence cannot be admitted to contradict such legal signification and compass of words, vide *Kelley v. Paulett*, Ambler 605. The sense of words as fixed by legal authority, is not to be altered by external proofs of contrary intention. Thus, for example, the sense and scope of the word *Relations*, where there is a devise to persons by that general name, or to testator's 'family,' (see 9 Vez. jun. 319, *Crewys v. Coleman*) without any words of more specific designation, have been adjusted to the statute of distributions in courts of equity, and adjudged to comprehend only the nearest of kin to the extent of the degrees within that statute; and extrinsic evidence will not be let in to shew that a greater or less compass was intended to be given to the word by the testator, vide *Whithorne v. Harris*, 2 Vez. 527, *Roach v. Hammond*, Prec. in Chan. 401, *Harding v. Glyn*, 1 Atk. 468, *Green v. Howard*, 1 Bro. C. R. 31.

It may be useful as the point has occurred, to collect for the reader the decisions upon it, which are rather curious.

The construction does not render the will inofficious and nugatory, since the wife is excluded, not being within the meaning of the next

are not to be shaken by extrinsic evidence. Thus, that rule of construction which makes void a remainder of personal estate, limited upon a prior

of kin, but provided for by the statute by the name of wife. Neither is it without effect, though the persons to take under this construction be the same and only such as would take under the statute, for still their *shares* may be different; as if a testator directs a sum to be equally divided among his relations, it must go to them *per capita*, and not *per stirpes*, see *Thomas v. Hoole*, Cas. Temp. Talbot, 251, *Philips v. Garth*, 3 Bro. C. R. 64, *Butler v. Stratton*, 3 Bro. C. R. 367. The rule of division is the same also where the bequest is to the next of kin, and there are brothers and brother's children—so too if a legacy be given to the descendants of A. and B. equally, children and grandchildren take *per capita*. *Jones v. Beale*, 2 Vern. 381, which carried a bequest to relations to the children of a cousin-german, living the parent, cannot, as it seems, be law; nor if the parent of those children had been dead, and other cousin-germans living, ought it to have gone to the children of the deceased, for the statute does not carry the representation among collaterals beyond the children of brothers and sisters. And I apprehend there is no good authority for giving a share of such legacy to relations to brother's children, living the brother, vide 1 Bro. 32. But if the testator mark an intent to carry the word relations beyond the extent of the statute, the court will effectuate the disposition, the statute being only adopted from necessity. However, a legacy for a mourning ring to each of the testator's relations, by blood or marriage, was confined by the court to nearest of kin, according to the statute of distributions, and to those who had married persons entitled under it. See *Davison v. Mellish*, 5 Vez. jun. 529. It has been held that an exclusive appointment, under a power of appointing to and among such of testator's relations as shall be living at the time of testator's death, in such shares as the appointer shall please, is good, 1 T. R. 435, and where a trustee has the power of selecting, he may go beyond the statute of distributions, see *Crewys v. Coleman*, 9 Vez. jun. 319. So where a person has a power of distribution

Examples of rules of construction not to be opposed by extrinsic evidence.

gift or assignment of the same to a man and the heirs of his body, and vests the absolute and ultimate interest in the first grantee or devisee, cannot be opposed by parol evidence. Accordingly in *Stratton v. Payne*^a, where the testator devised his personal as well as real estate to A. P. and the heirs of her body, with a limitation over in default of issue of A. P., the limitation over was adjudged void both by the court of chancery and the lords, who concurred in rejecting parol evidence, (though it was the evidence of the person who drew the will), to shew an intention in the testator opposed to this construction.

^a 3 Bro. P. C. 257.

among *poor* relations, he may distribute among all poor relations however remote: but wherever the court is called in to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of distributions, 1 Ca temp. Lord Redesdale, *Mabon v. Savage*. If a testator give to his poor relations, one who is poor at the time of the death, but becomes rich before distribution, seems not to be entitled: and if a poor relation so entitled die before distribution, his claim is held not to be transmitted, *id.* It is to be observed, that as the property in these cases does not pass by virtue of the statute, (the court only taking it as their guide in ascertaining the persons to take) the shares and proportions are to be regulated according to the intent of the testator, *Brunsdon v. Woodridge*, *Ambl.* 507, *Butler v. Shalton*, 3 Bro. C. C. 367, and in a late case in the Common Pleas, the statute has been adopted as the guide for ascertaining the relations, to satisfy that term in a will where the subject was real property.

Again, it is a rule of construction in courts, both of law and equity, that a devise to a man and his heirs and assigns, or a bequest to one and his executors, administrators, and assigns, conveys no original interest to the representatives, but by transmission only, and that consequently the devise or legacy fails if the devisee or legatee die before the testator; and this construction, though it operates to destroy *pro tanto* the will, cannot be opposed by parol evidence of the testator's contrary intention as to the devisee; which point was decided so long ago as in the case of *Brett v. Rigden*, in *Plowden's Commentaries* (3) upon the statutes 32 and 34 H. 8. of wills, (which, like that of the 29 Car. 2, require a will to be in writing); where the evidence offered of the testator's declaration of his bountiful intention towards the heir of the deceased devisee was rejected, as being in derogation of those statutes of H. 8.; and the same point in respect to a *legatee* under similar circumstances, may be seen in the case of *Maybank v. Brooks*^b.

^b 1 Bro. C. R. 84.

(3) 345, 3d point, and see the case of *Doe dem. Turner v. Kett*, 4 T. R. 601. A. devised to B. and the heirs of her body, B. died in the lifetime of A. A. by a codicil confirmed his will, held that the heir of B. took nothing, although it appeared that A. knew of the death of B. and of the birth of her son before he made his codicil.

PART V.

Of the presumptive Trust in the Executor for the next of Kin of the Testator as to the Surplus undisposed of by the Will.

AN executor, to whom a legacy is given, is generally, by the equitable presumption raised by that circumstance, deprived of the benefit of his legal title; and becomes a trustee of the surplus undisposed of by the will, for the nearest of kin to the testator: which is a presumptive construction, arising out of the instrument itself, and resting on an implied exclusion from the whole, by a specific gift of part.

The question, as to the admissibility of evidence to rebut this presumption, will only properly arise where the legacy to the executor is accompanied by no particular words, denoting in a special manner the intention of the testator; for there may be cases, as *Rachfield v. Careless* (1), wherein the language

(1) 2 P. Wms. 157, in which case a legacy of 5*l.* was given to the executor for his care in fulfilling the will. Vide *May v. Lewin*, 2 P. Wms. 158. n. 1. and the remark by the court in *Clennell v. Lewthwaite*, 2 Vez. jun. 473, also *White v. Evans*, 4 Vez. Jun. 21. and see the numerous distinctions on this subject in Mr. Coxe's note to *Farrington v. Knightley*, 1 P. Wms. 549. and the cases in the

whereby the legacy is given may carry the presumption so high, as to place it on a level with an

note at the end of *Nisbett v. Murray*; see also *Abbott v. Abbott*, 6 Vez. jun. 225, and the cases therein cited. From the whole of which it appears, that a legacy will not take away an executor's right to the surplus, unless such legacy is inconsistent with the supposition that he was meant to take the whole. But the executor is always excluded where the words of the will indicate an intention to impose a burthen rather than to confer a benefit whether there be any legacy given to the executor or not, 7 Vez. jun. 225. *Urquhart v. King*. 10 Vez. jun. 711. *Selley v. Wood*. Where an executor had a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin, 10 Vez. jun. *Williams v. Jones*. A legacy to the next of kin does not exclude such next of kin from their title as such, 10 Vez. jun. 74. It is to be observed, that in this case of *Rachfield v. Careless*, evidence seems to have been admitted in favour of the next of kin, upon which Mr. Coxe remarks, that it appears to be the only case in which parol evidence has been admitted in favour of the next of kin. Nothing, indeed, is more obvious than the distinction between *raising* and *rebutting* a presumption or an equity, for the former of which objects, parol and extrinsic evidence can never, without great violation of principle, be admitted, but the equity ought first to be raised by the presumptive construction of the instrument, to which equity parol evidence may be opposed, and then I conceive it follows upon sound maxims, both of law and equity, that parol evidence may likewise be adduced in opposition to this rebutting evidence, and in support of the original presumptive equity. And this, I apprehend, has always been the rule of proceeding; so that the observation of the learned editor just alluded to, must be understood as ~~adverting~~ only to the inadmissibility of parol evidence, in the first instance, and for the purpose of *raising* the equity for the nearest of kin, against the legal title. Indeed, the parol evidence, in the case last-mentioned, for the next

When a legacy takes away an executor's right to the surplus.

Of the distinction between admitting evidence to raise and to rebut an equity.

explicit declaration, and above all parol proofs to the contrary. Mr. J. Powis, who sat for the Chancellor, in the last-mentioned case, declared his general repugnance to admit parol evidence in opposition to this equity for the next of kin, and stated it to have been a *vexata questio*, on which there had been the greatest variety of opinion in all the tribunals in which it had been agitated.

It seems that in the earlier cases, the hesitation in admitting parol evidence to repel this trust for the next of kin, arose in a great degree from the doctrine that in courts of equity an executor was not to be considered as any thing more than a trustee (2). But since the case of *Foster v. Munt* (3), an executor has been uniformly regarded as entitled to the whole undisposed of residue, unless there is a violent presumption to the contrary, which a legacy given to him by the testator, without any disposition of the surplus, was by that case considered as affording.

of kin, seems to have been superfluous, since the presumption against the executor, from the particular language of the bequest to him, was so strong as to amount to a declaration by the will itself.

(2) See the case of the Duke of Rutland v. the Duchess of Rutland, 2 P. Wms. 212, and the observations of Powis J. in *Ratchfield v. Careless*, 1 P. Wms. 548. That an executor and administrator having paid all debts, legacies, and funeral expences, was compellable to divide among the next of kin, was a proposition in 2 Inst. 33, which appears to have been inadvertently laid down.

(3) 1 Vern. 473. 2 Vern. 676.

It would be endless to enumerate the cases upon this subject (4), but it may be useful to consider a little the important case of *Nourse v. Finch**, which came before Mr. J. Buller, sitting for the Chancellor in 1791. The Judge made three points of the case, 1st, Whether parol evidence should be admitted at all; 2dly, if admissible at all, to what extent it could be admitted; 3dly, if all the evidence offered in the case was admissible, whether the evidence which was read was sufficient to rebut the equity of the next of kin, under the circumstances of that case. It was the decided opinion of the Judge, that the evidence tended to a conclusion directly opposed to that for which it was brought forward, but he discovered a sentiment equally strong against admitting parol evidence *at all* in such cases, avowing the short period of his authority in that court as his reason for declining an opposition to the series of authorities in the same court the other way. It appeared also to be the clear opinion of the Judge, that even under these authorities, at most only that part of the evidence could be admitted, which referred to the time of the making of the will, and that he probably would have rejected the evidence offered on *that* ground, if

Mr. Justice Buller's observations on the admissibility of parol evidence in these cases.

* 1 Vez. jun. 344.

(4) In *Clennell v. Lewthwaite*, 4 Vez. jun. 471, which was decided above thirteen years ago, it was observed by the Master of the Rolls, that the cases on the question were so numerous, that it was a disgrace to the court.

under his third view of the case it had not been clear against the executrix; and the force of Mr. J. Buller's objections have been acknowledged by great authorities since the decision above-mentioned.

Of the general
admissibility of
parol evidence
to repel the
presumption
against the ex-
ecutor.

The decree of the Judge was afterwards confirmed by Lord Chancellor Loughborough, on the insufficiency of the evidence offered. But since the case of *Clennel v. Lewthwaite* above-mentioned, in which the reasoning of the Judge in *Nourse v. Finch*, was much under review, and ably observed upon, it seems to have been regarded as settled, that parol evidence of all kinds is admissible to rebut the resulting equity for the next of kin, arising from any circumstances in a will by implication excluding the executor from the benefit of his legal title; and it seems to be of no importance, as to the mere question of admissibility, whether the matters in proof were contemporary with, or subsequent to the will, although there is admitted to be a great difference in the weight of the different kinds of testimony.

All the cases were then set forth in the order of time in which they were decided, and profoundly commented upon by the late Lord Alvanley, who yielded to the pressure of authorities for admitting the extrinsic evidence in these cases, except where the expressions of the will carried so prevailing an import against the executor, as to amount to a *declaration* of the trust for the next of kin; which, accord-

ing to the effect given to it in *Rachfield v. Careless*^b, will shut out all access to argument from external circumstances. Finally, in *Trimmer v. Bayne*^c, the doctrine received its full confirmation from the present Chancellor, who declared the sum and sense of all the authorities to be, that all parol *declarations*, whether made *before*, or *at*, or *after* the making of the will, were admissible to *rebut presumptions*, though they are not all alike weighty and efficacious. Whether they consist of conversations with people who have nothing to do with the question, of declarations provoked by impertinent inquiries, or in whatever form they arise, they are *all* evidence, though intitled to very different credit and weight, according to times and circumstances, as will be further explained in the succeeding section.

PART VI,

Testator's Declarations, how far Evidence.

IN the case of *Druce v. Dennison*, Lord Eldon observed, that formerly the courts were very jealous of admitting evidence of declarations by the testator, except such as were made by him about the time of

^b 2 P. Wms. 158.

^c 7 Vez. jun. 518.

Contemporary
declarations
must be attend-
ed to.

making the will; and towards the conclusion of his decree in that case, he remarked, that in receiving parol evidence, it gave him great satisfaction to find, that it was contemporary with the will. So in *Nourse v. Finch*^a, Buller J. expressed a stronger opinion against admitting declarations which did not take place at the time of making the will. And the further we go back in tracing this disposition to reject parol evidence of declarations made before or after the will, the more strongly we find it expressed. Thus, Lord Hardwicke observed^b, that the time of making the declarations was very material, and no regard ought to be paid to declarations made not at the time of making the will. Thus, again, in the case of *the Duke of Rutland v. the Duchess of Rutland*^c, it was said by Lord Macclesfield, that allowing parol evidence was exceedingly dangerous, and not to be done in the case of discourses made at a different time from that of making the will. And, again, by Tracy J.^d it was said, that no regard ought to be paid to expressions before or after the making of the will, which possibly might be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements.

The positions of the present Chancellor in *Trimmer v. Bayne* are to be read with discrimination; what he there observes as to the general admissibility of parol declarations, is applicable and was applied only to the

^a 1 Vez. jun. 359.

^b 1 Vez. 324.

^c 2 P. Wms. 215.

^d 2 Vern. 625.

question, whether an executor being also a legatee in a will is a trustee for the next of kin, or beneficially entitled to the residue as undisposed of; which is a question of rebutting an equitable presumption; as has been explained in another place. His lordship then lays down the affirmative with respect to the general admissibility of parol declarations to repel this presumption of equity in favour of the next of kin, with the following important distinctions, viz. that in the degrees of such evidence, contemporary declarations are clearly of the greatest weight—next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious, for, a declaration *after* the will as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered; but he *knows* what he *has* done, and is much more likely to speak correctly as to that than as to what he *proposes* to do.

But with these and perhaps other distinctions, such parol declarations by a testator are all alike admissible—they are to be decided upon by their *weight*—but by their *nature* they are all admissible*. The caution, however, with which all declarations by a testator should be admitted, is well pointed out in the same judgment in *Trimmer v. Bayne*, viz. that these declarations may be made with a view to delude, as being thought a necessary artifice to keep the peace of fami-

But with different degrees of weight all these declarations are admissible.

* Vide *Trimmer v. Bayne*, 7 Vez. jun. 519.

lies. In *Trimmer v. Bayne*, it was one of the grounds of the judgment, that the declarations there stated to have been made, and offered as evidence, had an evident purpose of deceiving the person making ~~the~~ inquiry.

PART VII.

Ambiguities.

The instance most frequently chosen as the example of the *ambiguitas latens*, is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty*. The case put by Lord Hobart, was that of a devise by a testator to his son John, having two sons of that name; and the same Judge having a little above decisively declared, that a testator's intent must be expressed in a will written, that it may be certain to the Court, observed on the case just put, that an averment might make this, *i. e.* who was designed by the testator, certain. The case and the comment contain together a true description of the *ambiguitas latens*, to constitute which, there

* See 5 Rep. 68. Lord Cheyney's case, Hob. 32. *Counden v. Clark*, 3d point, and 1 Salk. 7. *Lepcot v. Brown*.

ought to be a positiveness and certainty of verbal expression becoming ambiguous in sense by the discovery of a matter not appearing in the instrument. This is the ambiguity latent, which, as it is created by facts, so is it removeable by a further investigation of facts.

The names of persons appointed to take under wills^b, have on the same principle been set right by parol evidence, where both the christian and surname have been mistaken. In such case no words are *supplied* or *substituted*, but the mistaken appellation in the instrument is applied to the person really intended by it, and the names of persons having no intrinsic meaning, the will is rectified without any alteration of the sense.

Of mistakes in the names of persons.

There may be a distinction, indeed, between such mistaken use of a name, which, though a wrong appellation of the object of the testator's bounty, happens to belong to an existing person within the testator's knowledge and possible contemplation, and that of a name under which there is nobody to claim as coming within its literal description. Thus in *Beaumont v. Fell*^c, where the point arose upon a bequest in a will to Catherine Earnley, and the name of the person who claimed the legacy as the real object intended to be benefited was Gertrude Yardley,

Name mistaken, where the name used happens to belong to a person in being, and who might be in the testator's contemplation.

^b And see *Hodgson and Caldecot v. Fitch and Anr.* 2 Vern. 593.

^c 2 P. Wms. 141.

it was first shewn by her, and admitted, that no person called Catherine Earnley claimed the legacy, and then evidence was offered to shew that the scrivener, who took instructions for drawing the will, had made the mistake. The Court established the claim of Gertrude Yardley (1), but not without observing how very material it was to the case that no such person as Catherine Earnley claimed the legacy (2).

What ambiguity is created by devise to a person's family;

On the other hand, the Court of King's Bench treated the case of Doe on the demise of Hayter v. Joinville^d, as affording an instance of an incurable ambiguity. A testator having devised to his wife's *family* one moiety of his residuary property, and to his brother's and sister's *family* the other moiety, died, leaving a brother and sister living, and both with a numerous issue, as well as the children of a deceased sister. It was judged impossible to con-

^d 8 East Rep. 172.

(1) Edge v. Salisbury, Amb. 71. Gines v. Kemaley, 1 Freem. 293. Dorset v. Sweet, 1 Amb. 175. 1 Vez. Jun. 266. Parsons v. Parsons, and see particularly the case of Del Mare v. Rebello, 3 Bro. C. R. 246.

(2) In the case of Del Mare v. Rebello, 3 Bro. C. R. 246. the devise was to the children of the testator's sisters, Estrella and Reyna; Estrella had children Reyna had none, and had changed her name, and become a nun professed. But testator had a third sister, Rebecca, who had children. The Chancellor would not substitute the name of Rebecca for Reyna.

strue the will with any rational certainty, so as to make a precise application of the word *family*. And this was a proper example of the ambiguity patent, as the uncertainty was inherent in the term itself, which unless the context of the will had defined its applicability, could scarcely receive explanation from any extrinsic circumstances (3). Again, where a testator devises to 'one of the sons of J. S.'* who has many sons, no regard can be paid to any thing extraneous to the will, as the medium of expounding the testator's intention (4).

or to one of the
sons of J. S.

It is true, in the last instance, the ambiguity does not fully appear, till from the words of the instru-

* 2 Vern. 625. Amb. 175. 2 Mod. Cas. in Law and Equity, 122.

(3) But it has since been held in the Court of Chancery, that the word 'family' imports as definite an object of a devise as the word 'relations,' in respect to which the Court of Chancery has, upon grounds of convenience, adopted the rule of the statute of distributions; so that it seems a bequest to the 'family' of another person after the decease of such person, will be executed by the Court in favour of his nearest of kin. *Crewys v. Colman*, 4 Vez. Jun. 319.

(4) I have before observed, that where a testator gives the same legacy in different parts of his will to the same persons, it is an ambiguity which, unless helped out by some rule of construction, no extrinsic evidence can be received to explain. As to the existence of any and what rule of construction in this case, there has been a great contrariety of opinion. See 2 Atk. 373. 3 Atk. 493. Plowd. Comm. English edit. 541, margin, where all the authorities are collected.

ment the attention is directed to the predicament of the object to which the words apply, since, if in point of fact there was but one son, that son would be entitled ; but still it is obvious, that the reference to external facts (if there were more sons than one) would confirm the patent ambiguity, already attaching upon the words which in themselves express uncertainty, and suppose a plurality of individuals equally included within the *terms* of a gift intended for one only, and therefore present an ambiguity in the very face of the will (5).

(5) I have transcribed the following note from Edward Altham's case, 8 Rep. 155, as furnishing several examples illustrative of the part of the subject above treated : " If A. levies a fine to William his son, to have and to hold to him and his heirs ; upon this fine the Judge cannot make a question of any matter of law ; but now the party comes and avers in fact, and says, that A. had two sons, named William, an elder and a younger, and that his intent was to levy the fine to William the younger ; this averment out of the fine is good of this matter of fact, *which well stands with the words of the fine*, and shall be tried by the country. But if a man by deed gives goods to one of the sons of J. S. who has divers sons, here it shall not be averred which son was intended ; for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of S- or of the manor of D. to two *et heredibus*, and in truth there is the manor of North S. and South S. or Great D. and Little D. in this case issue may be taken *dehors*, *which* manor the conusor intended to pass, for that is matter of fact, not apparent in the fine, whereof the judge cannot take consance ; but it *stands well* with the fine, and shall be tried by the jury. But where the words whereby the estate is limited are to two *et heredibus*, that is apparent in the fine, and, by judgment of law, these

If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of it, extrinsic evidence cannot remove the difficulty, without putting new words into the mouth of the testator, and in effect, making a will for him. But if a will presents no ambiguity independently of facts, the uncertainty which arises must come from behind the instrument, and is in this consideration of the phrase with propriety called a *latent* ambiguity: and indeed to a certain extent extraneous evidence must be resorted to in establishing the title under any devise, since, let the words be ever so clear, the person designed can only bring himself within the description *in foro contentioso*, by proof of his identity.

The late Chief Justice of the King's Bench, in the case of *Thomas v. Thomas*, 6 T. R. 676, makes this observation: "It has been a long established rule, that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain, which, without the aid of such evidence, is uncertain; but here the evidence has itself raised the ambiguity; on the face of the will there is no uncertainty." This passage seems to imply, that where there is no uncertainty on the face of a will, but the

words *et heredibus* are uncertain and void, and no averment *dehors* can make that good which upon consideration of the deed is *apparent* to be void."

evidence *raises* the ambiguity, the case is incurable. Possibly, however, his Lordship did not mean to be so understood, since there would be tautology in the phrase of *latens ambiguitas*, unless it imported an ambiguity not existing on the face of the instrument, but lying behind in the dubiousness of the objects to which its provisions were directed, and therefore capable only of being explained by reference to those objects through the medium of external evidence.

The truth will be found upon consideration to be, that the state of facts *raises* the *latent* ambiguity^f, and may also *dissolve* it; but the *patent* ambiguity consists in the uncertainty of the language used or in the vagueness of description or expression, and can be expounded only by the context and general sense of the instrument. *Thomas v. Thomas*^g, above referred to, was a case of the *ambiguitas latens*, wherein the words of the will comprised a clear and certain description, but the parol or extrinsic evidence raised the doubts respecting the intention of the testator. The state of facts in that case created the latent ambiguity; which facts were shortly these:

The testator devised lands to Mary Thomas, his granddaughter, of Llechlloyd, in Merthyr parish, and it turned out in fact that the testator, at the time of his death, had a grand-daughter, of the name of Elinor Evans,

^f 1 Bro. 85.

^g 6 T. R. 676.

who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, Mary Thomas, an infant, of the age of two years, the only person of that name in the family; but it appeared that she lived at Green Castle, in the parish of Llangain, at the distance of some miles from Merthyr, in which place she had never been.

Here there was a person in existence to answer to the name in the devise, but she was neither the grand-daughter, nor living at Llechlloyd, in Merthyr parish, and there was another person of the family who was of Llechlloyd, in Merthyr parish, but to whom the *name* and relationship did not apply. The judge at nisi prius received the evidence (subject to the opinion of the Court as to its admissibility) to shew that the name of Mary Thomas was inserted by mistake for that of Elinor Evans; but the jury were not persuaded by it, so that the admissibility of that evidence did not come to be judicially decided. The contest between these claimants, to neither of whom the words of the disposition corresponded, opened the way by the uncertainty appearing on the parol evidence for the title of the heir at law.

After the jury had found that there was no mistake in the name, the question of course lay wholly between Mary Thomas, and the heir at law, or, in other words, the only consideration which remained was, whether the description was applicable, with suf-

ficient certainty, to entitle her as the object of the disposition ; in which shape of the contest the distinction which has been above shewn to have been taken in *Beaumont v. Bell*^b, in favour of those cases of defective dispositions, where the person intended was clearly perceived through the mistake, and no person was in existence to claim under the erroneous description, became very important ; for though the jury had disallowed the pretensions of Elinor Evans, the court thought that in as much as the description both of place and relationship was applicable to her, such a degree of uncertainty as to the person intended was thereby introduced as was sufficient to exclude the application of the maxim of *falsa demonstratio non nocet* ; for that rule will only apply *si constat de persona* (6). And therefore, as Elinor Evans could not take because nothing but the description or *demonstratio* belonged to her, and there was a person in existence and claiming, to whom the name applied, so neither was Mary

^b 2 P. Wms. 241.

(6) But a true description will assist a wrong name, if there is no other person of the name. 2 Vez. 217. And if there is a *certain* description, and a further description is added, it is immaterial whether the superadded description be true or false. See *Bradwin v. Harpur*, Amb. 375. Which case presents an instance of a transposition of parties, the legacy intended for one being given to the other by a very evident mistake of the names. See this subject ably commented upon in *Doe on dem. Harris v. Greathhead*, 8 East 91, see also 8 East, 149.

Thomas suffered to take under the devise, because nothing but the name applied to her, and the description both as to place and kindred was precisely appropriate to another person in existence and contending for the preference on these grounds (7).

It is to be observed, that neither the christian nor surname of Elinor Evans agreed with the name in the will; but where the mistake has been only in the christian name, and the instrument has contained a full and exact description of the person so *imperfectly* designated by *name*, although there has existed another person *wholly* answering to the name in *both* particulars, the particularity of the *description* has outweighed the advantage on the other side arising from the coincidence in both the christian and surnames. As where the devise was to the Rev. Charles Smith, of Stapleford Tawney in the county of Essex, clerk, and the legacy was claimed by the Rev. *Richard* Smith, of Stapleford Tawney, in the county of Essex, clerk. It was contended that one Charles Smith, an officer in the army, who had lived at Rumford in Essex, and had been dead some time, was intended, and that so the legacy had lapsed; but it was proved by the widow of Charles Smith, that he

Of the effects of
a false or true
description.

(7) In this case, the first ambiguity was *ambiguitas latens*, for it only appeared by reference to outward circumstances; but though extrinsic circumstances produced the ambiguity, they offered no media for its explanation; and this is the proper description of an incurable latent ambiguity.

died before the testatrix made her will; and upon the court's manifesting a decided opinion against the executor and trustee of the residuary legatee, the point was given up, and a decree was made for the legacy, with interest, but without costs, in favour of the plaintiff, the Rev. Richard Smith (8).

The result seems to be, that wherever an ambiguity arises from the inapplicability of the name or description; as such ambiguity is produced by the state of facts, it is open to explanation by parol evidence, being properly an example of the *latens ambiguitas*; but still the evidence, when let in, may encrease instead of lessening the degree of uncertainty, or it may fall short of affording that degree of inference, which is requisite to decide the court or the jury.

Of the effect of
a blank left for
the name of a
legatee.

Thus much as to mistakes in the names and descriptions of persons, by which it appears, that very wide deviations and mistakes have been corrected by parol and extrinsic evidence; but when a *blank* is left for the name of a legatee or devisee, it is too much to set up an object of the testator's

(8) 6 Vez. Jun. 42. Smith v. Coney. So in Parsons v. Parsons, 1 Vez. Jun. 266, and in Garth v. Meyrick, 1 Bro. C. R. 30, circumstances weighed in favour of a person imperfectly named against another person to whom the name belonged, but who clearly appeared not to be the person intended, when the circumstances of description, and the facts coming in upon parol evidence, were coupled together.

bounty, by any description of evidence. Thus in the case of *Hunt v. Hort* (9), where the testatrix directed that her other pictures (having made some previous specific bequest of pictures) should become the property of Lady —, the Chancellor said he could not supply a blank by parol evidence; though there certainly were some strong circumstances in the will itself, to shew that Lady Hort was the person intended. But where there was a blank only left for the christian name, evidence was without difficulty read to shew the testator's intentions, with regard to the person answering to the surname¹. And two initials of the person to whom a legacy is given, have been filled up by parol evidence of the person intended (10).

It must be allowed, that, in the last instance, the rule of admitting parol evidence in the case of an ambiguity latent, and rejecting it when offered to expound an ambiguity patent, becomes a little un-

Some ambiguities patent are not incurable.

¹ *Price v. Page*, 4 Vez. Jun. 680.

(9) 3 Bro. C. R. 311; and the same point was adjudged in *Baylis and Church v. the Attorney General*, 2 Atk. 239; and again in *Castledon v. Turner*, 3 Atk. 257. and see *Pym v. Blackburn*, 3 Vez. Jun. 457.

(10) *Abbott v. Massie*, 3 Vez. Jun. 148; and where a will is hardly legible, and the legacies are in figures, the Court will refer it to the Master to examine what the legacies were. So where a legatee's name was falsely spelt, it was referred to a Master to see who was intended. 1 P. Wms. 425.

steadily. Where a testator gives a legacy to Mrs. G. it is not easy to shew that the ambiguity which this imperfect designation creates is not an ambiguity arising upon the face of the will, and, as such, an ambiguity *patent*.

Perhaps we must allow that the rule is flexible to the extent of admitting extrinsic evidence in a few particular cases, where the ambiguity, though *patent*, arises from something short in the expression or designation of the objects of the testator's intention, and is of a nature calculated to receive an easy explanation from outward facts.

So in other cases, although the effect of a positive clause^k, is not to be controuled by inference from other parts of the instrument ; yet if matter can be collected from the general context of the instrument, the *approach* to an ambiguity patent in a *particular* clause or sentence, will not exclude the admission of parol evidence, provided it tends to confirm this collective inference from the context. indeed, *that* can scarcely be termed an ambiguity, which is capable of an exposition from other parts, or from the bearing and scope, of the instrument.

Of the lights reflected upon particular passages by the context.

And it is generally true, that where the context of the instrument reflects light upon an ambiguous passage, but not strong enough to decide the exposition with sufficient certainty, it may nevertheless afford

^k 8 Vez. Jun. 42. *Jones v. Colbeck*.

a ground for the admission of extrinsic evidence. Perhaps too we may go a step further, and say, that where such secondary grounds of construction are morally decisive, as may sometimes be the case, it may be doubted, whether any extrinsic evidence can be received to contradict it, for instruments are not to be construed piecemeal, but illustration is to be borrowed¹ from all the parts of them, to give light to particular passages.

In *Ulrick v. Litchfield*^m, the ambiguity was also upon the *face* of the instrument, but there was a bearing in the language of the will that assisted the sense; parol evidence was therefore, as it seems, very consistently and properly admitted, to decide the preponderance. The devise in *Castledon v. Turner*ⁿ, upon which the question arose, was considered as receiving illustration from the other parts of the will, and from a natural order of preference, inferible both from the instrument itself, and from the relation of the persons concerned, so that the particular uncertainty was expounded by a comparison with the general tenor and object of the will; yet the Lord Chancellor seemed to hold, that as it was a case in which there was an absolute omission of a devisee, no extrinsic evidence could be admitted. But the case, as it was regarded by his Lordship, did not stand in need of it, there being enough in the will

¹ See *Coker v. Guy*, 2 Bos. et Pull, 565.

^m 2 Atk. 372.

ⁿ 3 Atk. 257.

for its own exposition. The point of the case was this: "W. bequeathed his lands to his wife for her life, and after her decease, to M. D. the niece of his wife, and proceeded thus: Item, I give the use of 500*l.* stock for *her* natural life, but after *her* decease, I give the 500*l.* among my wife's brothers and sisters." Lord Hardwicke considered this as a case of the absolute omission of a devisee, and nearly the same as where a blank is left for the name of the devisee, in which case parol evidence is always excluded.

The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property.

Upon the whole it appears that whatever doubts may exist, whether in *any* case of a palpable ambiguity *patent*, any help can be borrowed from mere parol evidence, consisting of *words* and *declarations*; yet it seems to be settled in practice, that if the court can, from the lights furnished by the instrument itself, gain some foundation of conjectural inference, they will look out of the instrument itself to the situation of the parties or persons concerned. *Masters v. Masters* (11), was a strong case decided on this principle. There a testatrix gave a sum of money *to all and every the hospitals*, without saying where the hospitals intended by her were; but because it appeared that the testatrix lived at Canterbury, and moreover, that she took notice by her will

(11) 1 P. Wms. 423. It appears also by this case, that a blank left in a codicil may sometimes be supplied from the will. And see 13 Vez. Jun. 174, that circumstances dehors the will may be evidence as to the property, but not as to the intention.

of two Canterbury hospitals; the devise was held not to be void for uncertainty, but to have been intended for all the hospitals of Canterbury.

The same practice of looking out of an instrument to the situation of the parties concerned, for collecting inferences of intention, appears in the case of *Harris v. the Bishop of London*¹, which was thus: Talbot Barker being seised in fee of a real estate, as heir on the part of his mother's mother, and being also seised in fee of a very small estate of *4l. per annum*, as heir of his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which, he devises the residue of the rents and profits of the premises to his own right heirs of his mother's side, for ever; and the question was, who should be entitled to the residue of the rents and profits; whether the heir of the mother's father, or the heir of the mother's mother. Here the court looked *beyond* the will to the testator's title to the property devised, and finding it to be derived through the mother's mother, decreed it to go to the heirs of the testator on the part of his mother's mother.

This will perhaps appear when properly considered a stronger case than that of *Masters and Masters*, for although the extraneous matter was not introduced to explain an ambiguity patent,

¹ 2 P. Wms. 135.

since in the words of the will there was no ambiguity at all; yet it was certainly resorted to by Lord Macclesfield, to annex a meaning to words beyond their legal effect; the "right heirs of the mother's side," being a description properly applicable, in the first place, to the heir of the mother's father; nevertheless, as we have seen, the court gave the estate to the heir of the mother's mother, in deference to the argument drawn from the manner in which the estate had in fact devolved to the testator. And it is to be further noted, that in this case the Chancellor did not look out of the will to the title to the property for the sake of deciding the judgment already inclined the same way by the context of the instrument, for it does not seem that the will afforded any internal evidence,

Equity prevents the extinction of a debt by a devise to the debtor, and holds the interest to pass by a bequest of the personality; and extrin-

But the want of this internal evidence in the will itself, to justify the resort in the last-mentioned case to the external facts, makes the propriety of that decision at least *questionable*, if we regard the authorities on this head; and, perhaps the consistency of legal principles was better consulted by the firmness of the decision of Lord Talbot, in the case of *Brown v. Selwyn*[†], which was shortly as follows: John Brown made his will, and after several dispositions of real and personal property, devised as follows: "And as to the rest, residue and remainder of my estate, whether real or personal, whereof I am seised

[†] Cas. Temp. Lord Talbot, 240; and see 4 Bro. P. C. 179.

or possessed, or which I am any ways entitled to, I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, his or their heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants." And the testator afterwards appointed the plaintiff and defendant his executors, and died, and the plaintiff and defendant both proved the will. The defendant was, at the time of the testator's death, indebted to him in 3000*l.* and for securing thereof, had given a bond to the testator (12). The prayer of the bill was, that the defendant might account with the plaintiff for the testator's residuary property, and pay to him a moiety of the said sum of 3000*l.* with interest, and the cross-bill was brought to have the bond delivered up to be cancelled. It appeared by the answer of the defendant in the original cause, and by the proofs (13),

sic evidence of a contrary intention in the testator cannot be received.

(12) In equity, a debt is not released by a creditor's making his debtor his executor; but at law it is otherwise; and if a creditor makes his debtor and another his executors, the consequence at law is still the same; nor is this consequence varied by the fact of the debtor's administering, or not administering; the reason whereof is this, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. See this doctrine well treated of, in *Plowd. Comm.* 184. *Woodward v. Lord Darcey*.

(13) In courts of equity, these parol proofs are generally permitted to be read without prejudice. But at law, where the jury

that the testator really designed to give this money to the defendant, and that he had actually instructed one Viner, the attorney who drew the will, to make this disposition accordingly: that Viner neglected to make mention of it in the will, insisting that the bond would be extinguished and released, of course, by Selwyn's being appointed executor; but that the testator appearing dissatisfied with Viner's opinion, a case was laid before counsel, who confirmed what Viner had said, relying upon which, the testator signed and published his will, with a full persuasion that the bond would be extinguished; and this appeared clearly to have been the intention of the testator.

It was impossible for parol evidence to be more decisive than that which was offered in this case, if it could have been received; but it is equally plain, that if the will were considered without the parol evidence, and the general devising words giving all the real and personal property, not before disposed of, to the residuary legatees, were only attended to, that this debt was included in the bequest, as falling under the description of personal estate. The Chancellor, although he declared it to be his private opinion that the debt was intended to be released to the

might, and probably would be, influenced, by the admission of such improper testimony, the production of it will not be allowed. See this distinction adverted to by Mr. Justice Powell, in *Newton v. Preston*. Prec. in Ch. 104.

executor, by whom it was owing, thought himself not at liberty to yield to the parol evidence, and to make a construction against the plain words of the will.

Although the case of *Brown v. Selwyn*, is not easily reconcileable with that of *Harris v. the Bishop of London*, yet it is not opposed to the doctrine of the admissibility of parol and extrinsic evidence, to decide the judgment already strongly inclined by the context and external evidence of the instrument.

CHAP. IV.

REPUBLICATION OF WILLS.

THERE is a difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act; and upon this distinction, will, it seems, depend the question, whether or not the *first act* of the testamentary disposition will require to be executed and attested according to the statute. But whether the subsequent writing be considered as a republication by way of codicil, or as the conclusion of something already begun, it seems settled that such *subsequent* writing to be effectual to pass land, ought to be executed as the statute directs in the case of a devise of lands.

In what sense a codicil is to be understood as incorporated into, and making a part of the will.

When a will properly executed to pass freehold estates, refers to an unexecuted paper *already in existence*, by an unambiguous description, and expressly adopts its contents among its own dispositions, such paper is, with exact propriety, said to be incorporated into, and to be executed by the execution of the will, for its relation to it is that of the part to the

whole ; but where a *codicil* is said to be part of, or incorporated into a will, this union must be understood to be the effect of its *first acting upon the will by its own force, and attracting it to itself.*

Hence we see the necessity of its being executed according to the statute. In the case put of the reference by the will to an existing paper, such paper is mute till it is acted upon by the will, and has no testamentary operation before the execution of the will ; whereas in the instance of the *codicil, the will is first acted upon thereby*, and being brought down to the date thereof, speaks again with reference to the state of the property, by virtue, not of *its own original execution*, but of *the execution of the codicil*, with which it becomes incorporated, and thus, by consequence of reasoning, becomes *re-executed and re-published* with the solemnities prescribed by the statute. And this is properly the republication by codicil, the effect and meaning of which is, that the terms and words of the will shall be construed to speak with regard to the property of the testator, and the objects of his dispositions, just as they stand circumstanced at the date of the codicil. In construing such will so republished, it must be considered therefore what the words of the will at the time of the republication import ; their *sense* cannot be enlarged (1), but their *operation* may, if time or ac-

Of the meaning and effects of republication.

(1) Neither, as has been before observed, can the original effect of the limitations be altered ; as, if there be a devise to J. S. and his

cident have increased the amount or number of the particulars comprised within the compass of its expressions (2).

After the statutes 32 and 34 Hen. 8. the courts of justice were frequently divided on the validity of parol republications of wills of lands, and it appears that in opposition to the clear sense of those statutes, the favour with which all testamentary dispositions were regarded, sometimes gave the effect of a republication to slight and unconsidered expressions. Thus, in the case of *Beckford v. Parnecott*^a, which was determined in the 37th year of Elizabeth, where a man seised of lands in A. devised the same to B. and C. and appointed them his executrixes, and then purchased other lands in A. and being requested to sell the lands which he had lately purchased, refused so to do, saying, "No, they shall go with my other lands in A. to my executrixes;" and afterwards being sick, the will was read to him, without his making any observation; but in a codicil, which he annexed, he gave legacies of goods to other persons on his

^a Cro. El. 493.

heirs, and J. S. die, and then the will is republished; the republication will not carry it to the heir. Plowd. 342. and see the case of *Stead v. Bouvrier*, 1 Vent. 341. Pollexfen, 546. 2 Jo. 135.

(2) It is obvious upon equitable principles, that if a will is republished, containing a general devise of testator's estates, an estate only contracted for after such general devise, will pass. 10 Vez. un. 605. *Broome v. Monck*.

death; upon a question being made, whether by these words spoken to a stranger, the will was republished, so as to make the new purchased lands pass; Fenner, Clench, and Popham held them to amount to a new publication(3). In *Fuller v. Fuller*(4), which took place much about the same time with that of *Beckford v. Parnecott*, where the devise was to the testator's son Richard, and the heirs of his body; which Richard afterwards died in the lifetime of the testator, and the testator said, "my will is, that the sons of Richard, my deceased son, shall have the land devised to their father, as they should have had if their father had lived, and died after me." Popham and Fenner held, that this was a new publication to carry the land to Richard's son, but Gawdy and Clinch were of a contrary opinion.

The point of republication was also frequently in agitation after the statute of 29 Car. 2, ch. 3. and there are early decisions of great laxity on the subject,

(3) According to the report in Mod. 404. Gaudy J. doubted. Dyer, 143 *a.* marg. pl. 55. cites S. C. as adjudged, and says the main reason given by Fenner was, that the annexing of the codicil amounted to a new publication.

(4) Cro. El. 423. In Mod. 353. where the same case is reported, the reporter adds a *quære*, and says the reason given for the difference in opinion was, because the last publication was not in writing; but the others thought there was enough before in writing, to pass the land to the issues; though there they were to take by descent, but, under the republication, by purchase. The better opinion appears clearly to have been that of Gawdy and Clinch, according to the analogy of all the best cases.

notwithstanding the provisions of that statute. Thus, in *Cotton v. Cotton*^b, which was before the Court of Chancery in the year after the passing of the statute of frauds, A. being seised of several lands in D. made his will, devised his lands in D. and all other his lands and tenements whatsoever, unto his wife, and afterwards purchased *other* lands, and then discoursing with B., B. desired him to let him have those newly purchased lands at the rate at which he bought them ; and the testator answered "No," for that he had made his will and settled his estate, and he intended that his wife should have his whole estate ; the court inclined strongly to hold this a new publication, and particularly with respect to the lands, and that it was not material that the words should have been expressed *animo testandi*, for that must necessarily be intended when the discourse had particular reference to the will. By the report of the same case in Chancery Reports, it appears that the point of republication was referred by the Court of Chancery to a trial at law, at which a special verdict, by the direction of Lord Chief Justice North, was found, and on a solemn argument before all the Judges of C. B. they unanimously gave judgment for the devisee against the heir at law.

Whether there can be any implied republication of a will, since the statute of frauds.

About forty years afterwards it was held by Lord Macclesfield, when he sat as Chief in the King's Bench, that since the statute of Charles, there could not be an implied republication of a will of lands,

^b Freem. 264. 2 Ch. Rep. 138.

even by the execution of a codicil referring thereto, but that the will must be re-executed (5). At a trial at bar before his Lordship and the other Judges of the King's Bench, the facts of the case appeared to be these. The Earl of Bath^c, by his will dated October the 11th, 1684, duly executed, took notice that his lands were settled upon his sons Charles and John, in tail male, and then devised in these words: In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands unto my brother B. G. and the heirs male of his body issuing. B. G. died in the lifetime of the testator, having issue George then Lord Lansdown, by which the devise to B. G. in tail male lapsed. On the 15th of August, 1701, the testator sent for seven persons and said, I sent for you to be witnesses to my will, and sometimes to be witnesses to the republication of my will; and then took a codicil, dated 15th August, 1701, in one hand and the will in the other, and said, this is my will whereby I have settled my estate, and I publish this codicil as part thereof; and then signed the codicil, (which lay upon the table with the will) in the presence of the witnesses, who subscribed it in his presence.

^c Panphrase v. Lord Lansdown, Vin. Abr. tit. Dev. (Z) 22.

(5) That a will may be republished by the testator's repeating upon it the ceremonies required by the statute, vid. Herbert v. Turbal, 1 Sid. 162, 1 Keb. 589.

By the codicil, 'he devised in these words: "Whereas, I heretofore made my will, dated 11th October, 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations in my family and estate, I, by this codicil, which I appoint to be taken as part of my will, devise as follows;" and then devised divers manors, &c. to his son Charles and his heirs, and 100*l.* *per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but to the codicil only. And by Parker, Ch. J. and by the whole court, this was held no republication; for, since the statute 29 Car. 2. there shall be *no republication by implication*, but the *will* must be *re-executed*, otherwise a devise of lands shall not be good.

Sir William Lytton⁴, by his will 23d March, 1700, devised all his lands to his nephew Lytton Strode and his heirs, and directed that he should take the surname of Lytton; and his personal estate he devised to Dame Russell, his sister, and Lytton Strode, and made them executors. After his will made, Sir William Lytton purchased the equity of redemption from the mortgagors in fee, of premises which

⁴ Lytton v. Lady Falkland, Vin. Abr. tit. Dev. (Z.)

were mortgaged to him before he made his will; and on the 13th June, 1704, by a codicil attested by three witnesses, he said, I make this codicil which I will shall be added to and be part of my last will which I have formerly made; and the Lord Chancellor Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, on the 16th June, 1706, decreed that this was not a republication, for, that since the statute of frauds, there could be no devise of lands by an *implied republication*; for the paper in which a devise of lands is contained, ought to be *re-executed* in the presence of three witnesses.

With respect to the first of these two cases, determined by Lord Parker and the Judges of the Court of King's Bench, though the resolution seems to have been grounded upon the rule then adopted, of holding the statute of frauds to be inconsistent with all implied republications of wills and which consequently forbade such effect to be given to a codicil which *declared no positive intention to republish the will*, yet, according to the principle of the case of *Brett v. Rigden** above mentioned, and the rule of construing a republication of a will, not to expand or alter the sense of its expressions, or the legal effect of its limitations, but to apply those expressions and limitations to the existing state of the subjects and objects of the dispositions at the

If an estate be limited to B. and his heirs, and B. die in the testator's life-time, the devise lapses; and a republication of the will does not give to the heir of B. a claim by purchase.

* Plowd. 345, and see *Hartop's case*, Cro. El. 248.

date of the republication, I do not see how any other judgment could have been given, even on the supposition that the will *was* republished; for if a will limits an estate to go by descent, and the person through whom the descent is to be transmitted dies before the testator, the devise clearly lapses; and if such will is republished, no person can take an estate under it in any other way, than that in which the *original* limitation was calculated to give it to him; he cannot take as a *purchaser* what, according to the effect of the limitation, he was designed to take by *descent*.

The same law, where the devise is of an estate to a man and the heirs of his body, succeeded by the words "And for want of such issue."

The principle of this reasoning was recognized in *Simpson v. Hornsby*^f, the question in which case arose upon the will of one T. A. who, having a wife and only two daughters, devised lands in several towns to his wife for life, for her jointure; and, after the death of his wife, to his daughter Bridget and the heirs male of her body; and for want of such issue, to his daughter Jane for her life, and after her death, to her first and other sons, in tale male successively, with several remainders over. Bridget died in her father's life-time, leaving issue a son, whom the grandfather took into his own house, and expressed much kindness for. Afterwards the grandfather made a codicil which began thus: "A codicil to be annexed to my will." And thereby he gave some part of a leasehold estate, (which, by

^f Prec. Ch. 439.

his will was given to his daughter Bridget) to her son, added another trustee for some charities, and duly executed the same. And the Lord Chancellor, after looking into the books, said he found it already settled, that Bridget dying in the life-time of the testator, the heirs male of her body could not take by purchase, for these words, 'heirs male of her body,' were inserted to express the quantity of the estate; though if the thing were *res integra*, he thought it plainly the intention of the testator, that Jane should not take till there should be a failure of the issue of Bridget, for this he thought the words *for want of such issue* fully imported.

These cases, therefore, contained circumstances which would have been an answer to the claims set up under the will, on the ground of its being republished by the codicil, without opposing the doctrine of an implied republication; for, upon the principle just above discussed, the republication of the will would not have extended the devise to the parties claiming by reason of it in those cases. However, in Lord Lansdown's case, we have observed, that Lord Parker in terms denied the possibility of any *implied* republication of a will of lands since the statute of frauds; and in the case above mentioned of *Lytton v. Falkland*, the resolution *could* only be founded upon the supposed effect of the statute, to exclude all implied republications, where real property was in question.

Upon these authorities a clear doctrine arose, apparently agreeing with the provisions of the statute, the sense whereof appeared to be, that though the will and codicil were both executed according to the statute of frauds, yet the codicil should be no republication of the will, so as to draw down the date of such will to that of the codicil, but the will itself ought to be re-executed to affect real property acquired since its original execution. About 10 years after Lord Macclesfield, then Lord Chief Justice Parker, had decided the case of *Panphraser v. Lord Lansdown* in the Court of King's Bench, *Acherley v. Vernon*^s came before him in the Court of Chancery, when his Lordship held an opinion on this subject, not conformable to that which he is represented to have pronounced on the former occasion. The case was as follows:

J. S. by a will dated the 17th January, 1711, devised to M. his wife 1000*l.* *per annum* for her life; to issue out of his real estate at H., &c.; to his sister E. 200*l.* *per annum*, for her life; and 1000*l.* to L. her daughter, for her portion; and after other legacies, he devised the residue of his real and personal estate to A. B. C. D. and E. and their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and directed that his trustees should stand seised and possessed of his real and personal

estate to the uses of his will, during his wife's life; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estates, and the lands to be purchased, should be settled to the use of the defendant G. for 99 years; then to his first and other sons in tail male, &c. J. S. purchased several fee-farm rents, assart rents, and other lands and tenements, and then by a codicil, dated 2d February, 1720, being two days before his death, he recites, that he made a will, dated 1st January, 1711, and then says, "I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L. shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of H., and the bulk of my estate; and I revoke that part of my will, whereby I appoint A. B. and C., three of my trustees, in my will, and I desire K. and N. to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil; that J. S's. signing and publishing his codicil, in the presence of three witnesses, was a repub-

cation of his will, and both together made but one will; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except the copyhold purchased before his will) did well pass. On appeal to the Lords, the decree was affirmed.

Notwithstanding the codicil in the case last produced *expressly confirmed* the will, yet the decree of the Court and judgment of the Lords, have been considered as standing on the *general* ground, that *every* codicil refers to and acts upon the will, and must in its nature not only suppose the existence thereof, but must attract it into an union with itself, bringing it down to its own date. And upon the authority of this case it stands, that whatever be the apparent purpose of making the subsequent instrument, and whether the subject of its express disposition be real or personal estate, if it import to be a codicil, and have the signature of the testator, and the attestation of three witnesses, agreeably to the directions of the statute in respect to wills of real property, it will have the effect of republishing the will.

This interpretation of the ground of the decree in *Acherley v. Vernon*, seems to be built upon the *general* expressions of Lord Macclesfield, in that case, "that the codicil being executed and attested by three witnesses, was a republication of the will;

and that they became one will;" and this seems the safest ground for the doctrine to rest upon, for the words of confirmation in the codicil, in *Acherley v. Vernon*, and those declaring the codicil to be part of the will, were only the expression of the tacit meaning of every codicil, which in its very nature supposes and recognises the existence and operation of the will.

That this was Lord Hardwicke's understanding of the case of *Acherley v. Vernon*, clearly appears from the expressions used by him in *Gibson v. Lord Mountfort*^a, where his lordship says, that in *Acherley v. Vernon*, it was the opinion of the judges, that the codicil was incorporated with the will, *which made it a republication*: thence deducing this *general* proposition, that every codicil executed according to the statute of frauds, to whatsoever part of the property it may relate, would be a republication of the will. It was admitted for the heir, said his lordship, that though it is a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that *that* will make the codicil, duly executed, a republication of the will. But, said the same Chancellor, this will make *every* codicil a republication, if it is executed by three witnesses, though it relates only to personal estate; for a codicil is, undoubtedly, a farther part of the last will, whether it be *said so* or not.

^a 1 Vez. 492, 3.

But in the Attorney-General *v.* Downing¹, the Court seemed to be inclined to a *middle* course between the case of Acherley *v.* Vernon, wherein the mere act of making a codicil, executed according to the statute, was a republication, and those of Panphrase *v.* Lord Lansdown, and Lytton *v.* Lady Falkland, in which all implied republication was excluded; by requiring an intention to republish to be declared or expressed, or otherwise distinctly manifested, by the testator, in order to give to his codicil that effect. And Lord Chancellor Camden held, that the annexation of the codicil to the will was *one of the modes* by which such intention might be declared, and was *therefore* a republication. And his Lordship seemed to think, that the *expressions* used in the codicil, in Acherley *v.* Vernon, were the foundation of the decree, for the words, he said, were so blended with, and incorporated into the will, that the one could not stand without the other.

The present doctrine holds every codicil, unless it be confined in expression, a republication of a previous will, if such codicil be executed and attested according to the statute.

By the settling case of Barnes *v.* Crowe², the case of Acherley *v.* Vernon has been set up as the great authority on this subject, to the full extent of the doctrine ascribed to it by Lord Hardwicke, in Gibson *v.* Mountfort, as above laid before the reader; and the effect of *annexation* was there denied, as being only parol evidence of a republication, which Lord Commissioner Eyre said, could not be received since

¹ Ambler, 571.

² 7 Vez. jun. 436.

the statute of frauds. "If we disentangle ourselves from the rule, said the Lord Commissioner, that there shall be *no republication* without *re-execution*, the principle that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because by the nature of it, it *supposes* a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three witnesses. Before the statute of Charles 2, it was no part of the essence of the republication that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute, continued the Lord Commissioner, re-execution of the will is not necessary; nothing more is required than a writing according to the provisions of the statute, expressing that intent."

In the late case of *Pigott v. Waller*¹, before the present Master of the Rolls, his honour submitted to the authority of *Acherley v. Vernon*, as that case was understood by Lord Hardwicke, in *Gibson v. Mount-*

¹ 7 Vez. jun. 98.

fort, and by Lord Commissioner Eyre, in *Barnes v. Crowe*, but not without expressing some disapprobation of the reasonings on which that authority was supported, and a predilection for the old rule, as it stood upon the cases of *Lytton v. Lady Falkland*, and *Panphrase v. Lord Lansdown*; for, said his honour, a direct republication or re-execution is an *unequivocal* act, making the will operate precisely as if it were executed upon the day of the republication; but a reference to the will proves only, that the deviser recognises the existence of the will, which the act of making a codicil necessarily implies; not that he means to give it any *new* operation, or to do more by *speaking of it*, than he had already done by *executing it*. Why *his speaking of it* should make the will speak, as it is said, is not very easily discernible, as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first; but can that shew that he means it to exist in any *other* form, or with any *other* effect than he originally gave it.

But his honour concluded by saying, that *Barnes v. Crowe*, afforded a certain rule; and if he departed from that, it would only be to set every thing loose again; not to get back to, what he thought better, the *old rule*, for then *Acherley v. Vernon* would be in the way. He was therefore disposed, for the convenience of adhering to settled rules, and former decisions, to hold the codicil a republication (6).

From what has been said it may be collected, that though a codicil properly executed makes the will speak, (as it is expressed) at the date of the codicil, yet it must have words clearly applicable to the intermediate acquisitions, or it cannot have the effect of passing them. And if it had a specific reference to a thing existing when it was first published, but subsequently withdrawn, the republication of it by a codicil will not make it operate upon another subject, which has come by substitution into the place of the thing so withdrawn, though precisely similar in its amount and quality. Thus, where a man, by his marriage settlement, having a power to charge a sum of 2000*l.* upon certain premises, made his will accordingly, disposing of this sum, and afterwards by a subsequent settlement extinguished his former power, and created to himself a new power of charging the same sum on other property, and afterwards made a codicil with three witnesses, making no mention of the power; the Master of the Rolls, Sir William Grant, held clearly that the power itself being gone before the death of the testator, the will had nothing to operate upon, and could not be applied to the new power. It is true, he observed, a codicil has the effect of republishing a will, and makes it speak at the time of the

If a will has a specific reference to a thing subsisting when it was first published, but subsequently withdrawn, the republication of it by a codicil will not make it operate upon another thing, which has come by substitution into the place of the thing so withdrawn, though similar in amount and quality.

(6) The codicil related only to personalty, and expressed no intention to republish the will.

republication. But here the will speaks only of the power given by the marriage settlement, which was as much gone as if it had never existed. It was a new power, for a new consideration, affecting different estates^m.

This then appears to be the proper understanding of the doctrine, viz. that the codicil, if executed so as to act upon the subject, brings down the will to its own date, and makes it speak as if it were made at that time; but that still it is made to speak only *its own sense*, and if it had any particular view to any particular object or purpose, which ceased to exist during the interval between the will and codicil, the codicil will not, from the accidental aptitude of the words to another subject created or acquired since the will, have any operation upon that which was so entirely out of the original view of the testator.

In a very recent case (7), circumstanced in some respects like the one last above cited, where a will

^m 7 Vez. jun. 499, *Holmes v. Coghill*.

(7) 10 East. 242, *Lane v. Wilkins*. It must be admitted however, that the more prevailing and ostensible reason seemed to be, that as the will declared only the testator's intention not to disturb the existing limitation in tail by suffering a recovery, but to leave the estate to go as it stood limited, this declaration amounted to no devise at all; and when, after having altered his intention, and taken

had been made, and a recovery subsequently suffered, upon which was reserved a power to the testator to declare the uses of the land by his will or codicil, and then the testator made a codicil confirming his will, except where altered by that codicil, but taking no notice of his power. The Court of King's Bench, upon a case for their opinion out of Chancery, held that the power was not executed by the codicil: one of their reasons for which opinion seemed to be, that they could not infer an intention to execute the power from the mere general confirmation of the will by the codicil; though they readily admitted that it was not necessary, that any express reference should be contained in a will to make it a valid execution of a power.

It has also been solemnly decided, that this effect of a codicil upon a will, of making it speak as to the existing property of the testator, as far as the fair and legal comprehension of the terms of it will go, may be restrained by the manner in which the *codicil* is expressed. Thus, where the codicil, reciting the devise of the will, revoked the same as to two of the trustees, and then devised the *said* lands, &c.

a new estate in the premises by suffering a recovery, reserving to himself a power of appointment by deed, will, or codicil, he executed a codicil expressly confirming his will, such codicil could not be considered as carrying the will further than its natural and proper effect, which was not a positive devise or disposition, but the declaration of a purposed omission.

lands purchased between the will and codicil have been adjudged not to pass".

Of the doctrine of the republication of wills of personal estate.

As it is hoped that by this view of the cases the progress of the doctrine of republication, as to real estate, is made clear to the reader; I shall now say a few words upon the question of the republication of wills of personal estate. In respect to this description of property, the doctrine is said not to have been changed by the statute of frauds; and this appears to have been the opinion of Lord Hardwicke, from the words used by his Lordship in the case of *Abney v. Miller*^a, wherein the act of republication insisted upon was, that the testator, after renewing his leases, being in search for another paper, and the person who was assisting him, having taken up the will by mistake, he said, "this is my will," not meaning thereby to republish, but to shew that it was not the paper he wanted. His Lordship observed, that to make it a republication, there must be the *animus republicandi* in the testator, which observation warrants the inference, that he was then of opinion, that if the words used *had been declarative of an intention* to republish, they would have been effectual to produce such a consequence. What will be the weight of this doctrine of Lord Hardwicke, when the point comes directly under adjudication, remains to be seen; but in the mean time, one may be

^a 2 Bos. et Pull. 500, *Bowes v. Bowes*, (House of Lords.)

• 2 Atk. 599.

permitted to suggest, that there is a difficulty in conceiving why the clauses of the statute, which affect the publishing of wills, should not also reach to the republication of them.

A republication is a new publication, and if a will can be republished, by parol so as to make it pass property not affected by its original disposition, what is this but making partially at least a nuncupative testament, unaccompanied by the forms prescribed by the statute? We have seen that many of the judges struggled hard against admitting a parol republication of wills of *lands*, even before the statute of frauds, as being in contravention of *the statute of wills*; and where the requisites are not observed so as to make good a nuncupative testament, the statute of frauds has imposed the same necessity for a written declaration of the will in respect to personalty. No subsequent writing can republish a will of land, since the statute of frauds, unless it be executed so as to be itself capable of passing land according to that statute; why then should a will of personal estate be capable of being republished without the observance of the mode whereby alone a personal will can be rendered effectual?

This last branch of my subject may be concluded by observing, that although words are never allowed to have the effect of republishing a will of lands, (whatever may be the doctrine in respect to personal testaments) yet where an express or implied revo-

The destruction of the revoking instrument may operate as an implied republication by setting up the original will.

cation has taken place, it has been held that the will may be set up again by a species of implied republication, founded upon the destruction of the revoking instrument. As where a testator makes two wills, the latter of which is inconsistent with, or expressly revokes the former, yet if he afterwards destroy the second will, leaving the first in a perfect state, the original will is held to be set up again¹. And this seems to stand upon plain principles, for the first will, being ambulatory during the testator's life, is in existence without any alteration at the time when its operation is to begin, and that which was to be destructive of its operation, is out of the way at the moment when it was to have its destructive effect.

¹ *Glazier v. Glazier*, 4 Burr. 2512.

A P P E N D I X

OF

THE STATUTES.

29 Car. 2. c. 3.

An Act for Prevention of Frauds and Perjuries.

FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same. That, from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration

Parol leases and interests of freehold shall have the force of estates at will only.

for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

Except leases
not exceeding
three years, &c.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the full improved value of the thing demised.

No leases or
estates of free-
hold or copyhold
shall be granted
or surrendered
by word.

III. And moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

Promises and
agreements by
parol

IV. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the

party to be charged therewith, or some other person thereunto by him lawfully authorised.

V. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person, in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect.

Devises of lands shall be in writing, and attested by three or four witnesses.

VI. And moreover, no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall at any time after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated, by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

How the same shall be revocable.

VII. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences, of any lands, tenements, or

All declarations or creations of trusts shall be in writing.

hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Trusts arising, transferred or extinguished by implication of law, are excepted.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; any thing herein-before contained to the contrary notwithstanding.

Assignments of trust shall be in writing.

IX. And be it further enacted, That all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void, and of none effect.

Lands, &c. shall be liable to the judgments, &c. of *cestuy que* trust.

X. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June, it shall and may be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance, hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands,

tenements, rectories, tithes, rents, or other hereditaments, of such estate as they be seised of in trust for him at the time of the said execution sued, (2) which lands, tenements, rectories, tithes, rents and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestuy que* trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom, or usage, to the contrary in any wise notwithstanding.

And held free from the incumbrances of the persons seised in trust.

Trust shall be assets in the hands of heirs.

XI. Provided always, that no heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire* or any other matter be chargeable to pay the condemnation out of his own estate; (2) but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come, after the writ purchased, in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon; any thing in this present act contained to the contrary notwithstanding.

No heir shall by reason thereof become chargeable of his own estate.

XII. And for the amendment of the law in the particulars following, (2) be it further enacted by the authority aforesaid, That from henceforth any estate

Estates *par son* vis shall be devisable.

And shall be assets in the heir's hand. And where there is no special occupant, shall go to the executors.

pur autre vie shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple, (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIII. And whereas it hath been found mischievous, that judgments in the King's Courts at Westminster, do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered and signed in the vacation-time after the said term, whereby many times purchasers find themselves aggrieved.

The day of signing any judgment shall be entered on the margin of the roll.

This clause extends to counties palatine, by 8 Geo. I. c. 25. s. 6.

XIV. Be it enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, any judge or officer of any of his Majesty's Courts of Westminster, that shall sign any judgments, shall at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered.

And such judgments as against purchasers shall relate to such time only.

XV. And be it enacted, That such judgments as against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments, to be

charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail; any law, usage, or course of any court to the contrary notwithstanding.

XVI. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed: and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall upon the receipt of any such writ, (without fee for doing the same) endorse upon the back thereof, the day of the month or year whereon he or they received the same.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVII. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandizes, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorised.

Contracts for sales of goods for ten pounds or more.

XVIII. And be it further enacted by the authority aforesaid, That the day of the month and year of the enrolment of the recognizances, shall be set down in the margent of the roll where the said recognizances

The day of the enrolment of Recognizances shall be set down; and lands in the hands of

purchasers
bound from that
time only.

are enrolled; (2) and that from and after the said four and twentieth day of June, no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bona fide*, and for valuable consideration, but from the time of such enrolment; any law, usage, or course of any court to the contrary in any wise notwithstanding.

Nuncupative
wills.

Explained by 4
Ann. c. 16. s. 14.

XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

Probates of nuncupative wills.

XXI. And be it further enacted, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest, therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act.

Soldiers' and mariners' wills excepted.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this act.

The jurisdiction of courts saved.

XXV. And for the explaining one act of this present Parliament, intituled, "An Act for the better

22 & 23 C. 2. c. 10. husbands not compellable to

make distribu-
tion of the per-
sonal estates of
their wives.

settling of intestates' estates," (2) be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Made perpetual by 1 Ja. 2. c. 17, s. 5.

25 Geo. 2. c. 6.

An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils, concerning Real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America.

WHEREAS by an act made in the twenty-ninth year of the reign of his late Majesty King Charles the Second, intituled, "An act for prevention of frauds and perjuries," it is amongst other things enacted, that, from and after the twenty-fourth day of June, in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements deviseable, either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and sub-

scribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act; therefore, for avoiding the same, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act; notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil.

If a devisee or legatee under the will attests a will, the devise or legacy shall be void, and the attestation effectual.

II. And be it further enacted by the authority aforesaid, That in case, by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

If lands are charged with the payment of debts, the attestation of a creditor is good, and he is a good witness to prove the execution.

III. And be it further enacted by the authority aforesaid, That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

IV. Provided always, and be it further enacted, That in case of such tender and refusal as aforesaid, such person shall in no wise be intituled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

V. And be it further enacted, That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, shall have died in the lifetime of the testator, or before he shall have received or released the legacy or bequest so given to him as

aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

VI. Provided always, That the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before-mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the Court of Equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

The credit of every witness, so attesting, is to be subject to the determination of the court and jury.

VII. And-be it further enacted by the authority aforesaid, That no person to whom any beneficial estate, interest, gift or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

VIII. Provided always, and be it enacted by the authority aforesaid, That this act, or any thing herein contained, shall not extend, or be construed to extend, to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid; and also that this act, or any thing herein contained, shall not extend or be construed to extend, to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments, mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, and which has been already determined in favour of such heir at law, or devisee, in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made; any thing herein-before contained to the contrary thereof in any wise notwithstanding.

IX. Provided always nevertheless, and it is hereby declared, That no possession of any heir at law, or

devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

X. And whereas in some of the British colonies or plantations in America, the said act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required: therefore, to prevent and avoid doubts which may arise in the said colonies, or plantations, in relation to the attestation of such devises of lands, tenements, and hereditaments, be it enacted by the authority aforesaid, That this act, and every clause, matter, and thing therein contained, shall extend to such of the said colonies and plantations, where the said act of the twenty-ninth year of the reign of King Charles the Second, is by act of assembly made, or by usage received as law, or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements, or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said act of the twenty-ninth year of the reign of King Charles the Second in England.

XI. Provided always, That as to cases arising in any of the said colonies or plantations in America, no such devise, legacy, or bequest as aforesaid, shall be made null and void by virtue of this act, unless the will or codicil whereby such devise, legacy, or bequest shall be given, shall be made after the first day of March, which shall be in the year of our Lord one thousand seven hundred and fifty-three.

39 & 40 Geo. 3. c. 98.

An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.

[28th July 1800.]

Preamble.

No person by deed or will, &c. shall settle or dispose of any real or personal property, in such

WHEREAS it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained: may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, and by the authority of the same, that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so

and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the persons entitled thereto.

II. Provided always, and be it enacted, That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settler, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed.

Nothing herein to extend to any provision for payment of debts or for raising portions for children, or touching the produce of timber:

Nor to any
disposition of
heretable pro-
perty in *Scotland*.

III. Provided also, and be it enacted, That nothing in this act contained shall extend to any disposition respecting heretable property within that part of *Great Britain* called *Scotland*.

When restric-
tions shall take
effect with
respect to wills
made before the
passing of this
act.

IV. Provided also, and be it enacted, That the restrictions in this act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this act.

PRECEDENTS OF WILLS

AND

TESTAMENTARY DISPOSITIONS.

Power given in a Will to a Person to whom a Life-estate is limited, to charge the Estate with Portions for younger Children, varying in Amount with the number of Children to be provided for.

Provided always, and I do will and direct, that it shall and may be lawful to and for my said daughter Margaret, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the pre-

sence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereunto, to be signed and published by her in the presence of, and attested by, three or more credible witnesses, (but subject and without prejudice to the said annual sums or yearly rent charges herein before limited by this my will, and the powers and remedies for recovering the same) to subject and charge all or any part of the said hereditaments and premises, herein-before limited in use to her for life, to and with the payment of any sum or sums of money for the portion or portions of all and every the child or children of the body of my said daughter, lawfully to be begotten, (other than and except, and not being an eldest or only son, (1) entitled for the time being to the hereditaments and premises, or any part thereof, either in possession or in remainder, expectant on the decease of my said daughter, under the limitation contained in this my will) not exceeding the amount hereinafter mentioned, that is to say, if there shall be no more than one such child, (other than and except as aforesaid) not exceeding the sum of 5000*l.* for his or her portion; if there shall be two such children and no more, (other than except as aforesaid) not exceeding 10,000*l.* for the portions of such two children; if there shall be three such children, (other than and except as aforesaid) not exceeding 15,000*l.* for the portions of such three children; and if there shall be four or more such children (other than and except as aforesaid) not exceeding 20,000*l.* for the portions of such four or more of them; with interest for such por-

(1) Every child except the heir is considered in equity as coming within the description of younger children; thus the eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainder man, is a younger child in equity, *Beale v. Beale*, What equity understands by younger children

tion or portions; the same respectively, to be paid to such child or children at such age, day or time, or ages, days, or times, and, if more than one, in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over, such limitations over to be for the benefit of some or one of such children, (other than and except as aforesaid) as my said daughter Margaret shall deem prudent and expedient, and by any deed or deeds, instrument or instruments, in writing, so sealed, delivered, and attested as aforesaid, or by such last will and testament, codicil or codicils thereunto so signed, published, and attested as aforesaid, shall direct, limit, or appoint; but so, nevertheless, that if such children so entitled to have or be provided with portions as aforesaid shall be reduced to three, such three children shall not be entitled to have more than 15,000*l.* raised for their respective portions; and if such children shall be reduced to two, such two children shall not be entitled to have more than 10,000*l.* raised for their respective portions; and if such children shall be reduced to one, such one child shall not be entitled to have more than 5000*l.* raised for his or her portion.

Power to create a term of years for raising the said portions.

2 P. Wms. 244, and if a younger son becomes eldest, he is excluded, 2 Vez. 198, Lord Teynham *v.* Webb. Indeed, in Lady Lincoln's case, one who was a younger son at the death of the testator, and the tenant for life, becoming eldest before 21, till which the portions were subject to survivorship, on the whole will was held not entitled, 10 Vez. jun. 166.

Even an eldest son not provided for may be considered as a younger, of which see a curious instance in Duke *v.* Doidge, 2 Vez. 203, in the note. And where the descent is according to the custom of Borough English, without doubt, upon the same principle, the eldest son would be a younger to this purpose in equity.

A convenient form of a Will containing dispositions of real and personal Property, the whole to form one Fund, and go as personal Estate(1).

THIS is the last will and testament of me, Samuel H. of, &c. I give and devise unto A. B., C. D. and E. F., their heirs, and assigns, all my freehold and copyhold messuages, lands, tenements, and hereditaments, whercof I have power to dispose, with their, and every of their, rights, members, and appurtenances, in possession(2), reversion, remainder, or expectancy, to hold the same unto and to the use of them the said, &c. their heirs and assigns, for ever, upon trust, that they, the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor(3), do and shall, as soon

Real estate to trustees and their heirs to sell and convert the same into money.

(1) Instead of settling freehold estates as land, (a mode which, where there are several persons and their families to be provided for who are equally the objects of the testator's care, is inconvenient, as well from the difficulty in the way of a specific division by metes and bounds, as from the embarrassment and expence which often arise from creating numerous undivided shares in tail) it is adviseable to vest the lands in trustees, to be sold with the consent of those beneficially interested, to place out the produce of such sale, after discharging debts and legacies, in the funds or on real securities, to pay the interest in certain proportions to the persons who are to have life interests, and after their deaths to pay over the principal in equal shares among the children, with such other provisions as are exemplified in this will; and no sale need be made till the convenience of the parties calls for it, or a proper occasion offers itself.

Of the advantage of treating all the property as personal.

(2) The word possession always relates in legal construction to the time of the death, not of the execution of the will, unless explained, 5 Vez. jun. 816, Wilde v. Holtzmeier.

(3) If lands are devised to be sold and no body appointed to sell, it is the province of the executors, and a court of equity will compel all proper parties to join in the sale, 1 Atk. 490. The word 'dispose' does not of itself import a direction to sell, but to manage the estate, 3 Atk. 287.

as conveniently may be after my death, sell and absolutely dispose of the same, together, or in parcels, by public auction or private contract, as to them or him shall seem expedient, for the best price or prices, in money, that can be reasonably had or obtained for the same respectively, and respectively to convey and surrender the same accordingly. And I will and declare, that the receipt or receipts of the said (trustees), or the survivors or survivor of them, or the heirs or assigns of such survivor, for the money for which the same shall be so respectively sold, shall from time to time be a sufficient discharge (4), or sufficient discharges, to the purchaser.

Of the clause for discharging purchasers, and their liability, in the absence of such clause, to look to the application of the purchase-money.

(4) This clause ought never to be omitted, for though where it is not inserted the purchasers from the trustees are justified at law in paying their money to the trustees; yet, in equity, they are, in certain cases, considered as responsible for the application of the money according to the trusts. They have been held liable in most cases where there is a specification of the debts to be paid with the produce of the sale, but not where the trust is to pay debts generally, even though they have notice of the debts; nor are the purchasers bound where the trust is to pay debts generally, *and also legacies*, for though these last are specified objects, yet they are coupled with others which are unascertained, and they shall not involve the purchaser in the account of the debts: neither is the purchaser bound to see to the application of the purchase money, where the debts are *charged* generally upon the estate, though the contrary seems formerly to have been held, 6 Vez. jun. 654, n. But where lands are charged with the payment of *annuities*, they are liable in the hands of purchasers; for the object of making the lands a fund for the payment in this case was, that there should be a constant and subsisting fund, Barnard 82, 5 Vez. jun. 130, Wynn v. Williams. These appear to be the most important distinctions.

Where trustees for sale are also made executors; and of the statute 21 Hen. 8. c. 4.

A few further remarks on these trusts for sale may not be without use to the student. He will observe that the power of sale is generally given to the same persons as are named executors; and where that is the case and the subject is leasehold, there is no doubt but that any one, or any part of the executors, may alien the legal estate without the concurrence of the rest of the number; and this not by reason of their interest as trustees, because *as such* they are merely joint-tenants, and can only sever the jointure and alien their respective undivided shares, but by reason of their office of executors; for the particular power might in such case be said to flow into and

or purchasers of the said several premises hereinbefore made saleable by this my will, or any part or

be lost in their authority as executors, or perhaps more properly to give place and precedence to that general power which executors possess, *ratione officii*, over all chattels.

Where the subject of the power was freehold some regard was also had at common law to their office of executor, and to some purposes, even the power of disposing of freehold seems to have been considered as vesting in them *ratione officii*; and for this reason, it seems that if a power to sell lands were given to two executors, and one died, this power was by the better opinion held to survive, and to be transmissible to the executors of the survivor. Whether part of the executors could sell the whole of such property without the rest was a doubt at common law, as appears by some of the books, but particularly from the recital of the statute 21 H. 8, c. 4, which was made to put an end to these doubts. That statute, reciting that, *according to the opinion of divers persons*, where a testator had devised his lands to be sold by his executors, a bargain and sale would in no wise be effectual unless made by the whole number of the executors, for remedy thereof enacts "that all bargains and sales by those who accept the charge without the rest, shall be as good and effectual in law as if the rest had joined." This statute has always been construed largely and liberally as a very beneficial law; and thus though it expressly provides only for cases where the lands are willed to be sold by the executors, yet the settled construction has extended to cases where the will devises the lands to executors to be sold. Thus Lord Coke, in commenting on the 169th section of Littleton, P. 113, b. makes the following observations on this statute: "In Littleton's case admit that *one* executor had refused to sell, then as the law stood when Littleton wrote, it was clear that the others could not sell, but now by the statute it is provided that where lands are willed to be sold by executors, though part of them refuse, yet the rest may sell; and albeit the letter of the law extendeth only to where executors have a power to sell, yet, being a beneficial law, it is by construction extended to where lands are devised to executors to be sold." And the construction has been still further enlarged, for it has been held that where lands are devised to trustees to be sold, and the same persons to whom the lands are so devised, are in another part of the will made executors, the statute will extend to this case. Thus, in *Bonifant v. Sir Richard Greenfield*, Cro. El. 80, the case was this: "a testator seised of the manor of D. devised the same to I. S. and three others, and their heirs, to the intent that the trustees should sell it for the best profit, and apply the money as therein mentioned. And in the conclusion of the will he made the same four persons his executors, and died. One of the four refused to meddle with the will or sale, and the other

so if he accept
the charge, he
must then
carry -

24. Mich/1691

parts thereof, for his, her, or their purchase money, or so much thereof as shall be therein acknowledged

three sold the land in the life-time of the fourth, and whether the sale was good was the question. The case was argued by Popham and Egerton, and it was adjudged that the sale was good by the three executors, either by the common law, or by the statute 21 H. 8, c. 4.; for when he devises the land to four to sell, and afterwards makes them his executors, this doth tantamount as if at the first he had devised that such his executors should sell; and in such a case at the common law the sale by three, the fourth refusing, was good; for these three may perform the will without the fourth, but the statute makes it clear."

It is proper however to add, that though such a sale by one or some of the trustees and executors, the rest refusing, should seem to be good and valid to carry the whole legal estate and interest, yet where the receipts of the trustees are, by the deed, made discharges to the purchaser, there may be doubts whether he would be safe in paying his purchase money without a receipt and acknowledgment in which all are joined.

Of the conversion of real into personal estate, in equity, when partial and when total.

It is a general rule, that where property is devised to be sold by the trustees for particular purposes, as for payment of debts and legacies, nothing more is subject than those purposes require, and the personal estate must first be applied. There is in these cases, therefore, always a resulting trust of the residue, after the purposes are answered: the real results to the real, and the personal to the personal representative; and if the personal is sufficient to answer all the purposes, the whole real estate results and descends to the heir, or goes to the residuary devisee. And by the way it may be here noticed, that this residue is not like the residue that arises by lapse, in respect to which there is a difference between real and personal estate, as has before been noticed in page 381 of this treatise.

But sometimes by the effect of the dispositions of the will, as where there are ulterior general purposes to be answered by the sale, which require the estate to be converted, as is the case in the will to which this note is attached, the real estate by the direction to sell is made personal estate *out and out*, as it is usually expressed. And then there is no resultancy for the heir at law, but the character of personalty is impressed upon it to all intents and purposes; and if there is a residue it goes with the residuary bequest, or if there is no disposition of the residue, the mere appointment of an executor is sufficient to carry it to him, either for his own benefit, or as trustee for the next of kin; which question, between the executor and next of kin, is discussed in a subsequent chapter under its proper title; see 2 Bro. C. C. 589, and 1 Vez. jun. 44, *Robinson v. Taylor*, and see 11 Vez. jun. 87, *Berry v. Usher*. The truth is, when the estate is only devised to be sold to pay debts and legacies, it is con-

or expressed to have been received; and that such purchaser or purchasers, his or their heirs, executors, administrators, or assigns, or any of them, shall not afterwards be answerable or accountable for any loss, misapplication, or misapplications of such purchase money so received, or any part or parts thereof. And my will further is, that the monies which shall arise by or from such sale or sales as aforesaid, shall be deemed to be part of my personal estate; and that the clear yearly rents and profits of the said hereditaments and premises, in the mean time, until the same shall be sold, or of so much thereof as shall be remaining unsold, shall be deemed to be part of the annual income of my personal estate; and that the same monies, and rents and profits, shall be subject to the dispositions hereinafter made concerning my personal estate, and the annual income thereof, respectively. And as touching my personal estate remaining after payment of my debts, funeral and

That the monies arising by the sale shall be personal estate, and, until sold, the rent shall be considered as the income of the personal estate, and that the said monies, rents, and profits shall be subject to the dispositions after mentioned regarding the personal property of the testator.

sidered as in the nature of a charge only, 3 Vez. jun. 210, *Halde-
mand v. Hudson*.

A trustee for sale, as long as he retains that character, is never permitted to purchase for his own benefit. And though in a particular case there may be the most satisfactory evidence that the transaction amounts to no more than what the general interests of justice, and of the parties, would warrant; yet, as the powers of the court would not be equal to protect it against deception, from the impossibility of knowing the truth in every case, the rule of exclusion must of necessity be universal. The ground of the rule is, that the situation of the trustee gives him the opportunity of knowing the value of the estate he is to buy, better than the cestui que trust, and therefore they do not deal on equal terms; besides which, he is by his trust bound to apply his knowledge for the benefit of his cestui que trust; and therefore he cannot be permitted to make a bargain adversely with the party whose interest he is in conscience obliged to promote. But the trustee may shake off the character of a trustee by a previous agreement with his cestui que trust, if of age and capable of discharging him, (though it may be difficult to determine when that has been done effectually) and put himself in circumstances in which he will no longer be the person intrusted to sell, and then, it seems, he will be permitted to purchase; see the cases *ex parte Bennett*, 10 Vez. jun. 381, and *Sanderson v. Walker*, 13 Vez. jun. 601.

Of the rule in respect to trustees becoming purchasers.

And as to his personal estate remaining after payment of debts and legacies, and funeral and testamentary charges.

To the trustees upon trust to invest the same in the public funds.

With power to vary the securities.

To pay the dividends to the testator's daughter for life, for her separate use.

testamentary charges, and the legacies hereinafter bequeathed, I give the same to the said trustees, their executors, administrators, and assigns, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and agreements, hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they, the said (trustees), or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, or on real securities in England, at interest, and do and shall vary, alter, or transpose (5) such stocks, funds, or securities for others of the like nature, when and so often as it shall seem expedient; and do and shall pay the interest and dividends of the said stocks, funds and securities, unto such person or persons only, and for such intents and purposes only, as my daughter, E. H. by any writing or writings under her hand, from time to time, shall direct or appoint, notwithstanding any coverture she may be under; and in default of such direction or appointment, and in the mean time until she shall make any such direction or appointment, do and shall pay the same, or so much whereof she shall or may from time to time happen to make no such appointment, into the proper hands of my said daughter, exclusively (6) of

Of the propriety of giving the power of varying the securities.

(5) If a trustee of stock takes upon him to transfer at all without such a power, he is guilty of a breach of trust, and the cestui que trust is entitled in equity to his election, either to have the individual stock restored to him, or to have the money it produced; 2 Atk. 121, *Harrison v. Harrison*, 2 Bro. C. C. 653, *Bostock v. Blakeney*, 1 Vez. jun. 297, *Powlet v. Herbert*, 4 Vez. jun. 497, *Long v. Stewart*, 5 Vez. jun. 800, (n).

Where no trustee appointed.

(6) Where no trustee happens to be appointed for the wife to whose separate use property is devised, the husband becomes a trustee for the wife; 2 P. Wms. 316.

any husband she may happen to marry, who is not to intermeddle therewith, nor is the same or any part thereof to be subject or liable to such husband's controul, debts, or engagements. And I will and declare, that the receipts of my said daughter, or of such person or persons as she shall or may, from time to time, direct or appoint to receive such dividends or interest, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed to be received; and from and immediately after the decease of my said daughter, upon trust, that they, the said trustees or trustee for the time being, do and shall pay or transfer all such principal monies, stocks, funds, and securities, unto all and every the child or children of the body of my said daughter, lawfully to be begotten, equally to be divided between or among them, share and share alike, if there shall be more than one; and if there shall be but one such child, the whole to be paid or transferred to such one child; the share or shares of such of them as shall be a daughter or daughters to become vested in her or them respectively, on her or their attaining her or their age or respective ages of 21 years, or on the day or respective days of her or their marriage, which shall first happen; and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age or respective ages of 21 years, and to be paid or transferred at such age or ages, time or times as aforesaid, to such of the said daughters or sons as shall arrive at or attain the same after the decease of my said daughter, but as to such of them as shall arrive at or attain such age or ages, time or times, as aforesaid in the life-time of my said daughter, the payment or transfer of his, her, or their share or shares to be postponed till after her decease: provided and I do hereby declare my will to be, that if any such child or children, being a son or sons,

And after the daughter's decease to transfer the principal to and among her children in equal shares.

The respective shares to become vested at 21, or marriage.

With accretion by survivorship.

Provision for
maintenance.

In case of there
being no child to
take the benefit
of the before-
mentioned trust

Of the clause
making the ac-
cruing shares
subject to
survivorship.

shall depart this life before he or they shall attain his or their respective ages of 21 years, or being a daughter or daughters, shall happen to die before she or they shall attain her or their age or respective ages of 21 years, or be married, then the share or shares of him, her, or them so dying, shall go and accrue to the survivors or survivor, or others or other, of such children, and be equally divided amongst them, if more than one, share and share alike; and the same shall become vested and payable, or transferible, at such ages, days, and times as his, her, and their original portion and portions are hereby directed to become vested and payable, or transferible, as aforesaid; and in case of the death of any other of the said children of my said daughter before such accruing or surviving share or shares shall become vested as aforesaid, then every such accruing or surviving part or share shall again be subject and liable to such right, chance, contingency, or condition of accruer to and amongst the survivors or survivor (7), and others or other of the said children, as herein before is provided, touching the said original portion or portions; and upon further trust, that the said trustees or trustee for the time being, do and shall, after the decease of my said daughter, pay and apply the dividends or interest of the share or shares of such of the said children as shall not have acquired a vested interest in the portion or portions hereinbefore provided or intended for him, her, or them, respectively, for and towards his, her, or their maintenance and education, respectively, until the same respectively shall become payable. Provided that if there shall be no child of the body of my said daughter, lawfully begotten, or there being one or

(7) A. gives 1000/ among four persons as tenants in common, and directs that if one of them dies, before 21 or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share is a new legacy, 3 Atk. 80, 2 Ch. Rep. 131, 1 P. Wms. 275, Ca. temp. Talb. 124, 1 Bro. C. C. 575. The will therefore must specially provide for this.

more such child or children, and such, of them as shall be a son or sons shall happen to die before he or they shall attain the age of 21 years, and such of them as shall be a daughter or daughters shall happen to die before she or they shall attain her or their age or respective ages of 21 years, or be married, then, and in such case it is my will, that they the said trustees or trustee for the time being shall pay or impower ———, to receive the dividends or interests thereof during her life, and from and immediately after her decease, do, and shall raise the sum of —£. of lawful money of Great Britain, and pay the same to my nephew D., his executors, or administrators, and do, and shall pay or transfer one third part of the surplus thereof to ———, her executors, or administrators, one other third part to ———, her executors, or administrators, and the remaining third part thereof to ———, her executors, or administrators; provided that in case my said daughter shall be in her minority and unmarried at the time of my decease, the said trustees or trustee for the time being shall apply the dividends or interest of such principal monies, stocks, funds, or securities as aforesaid, for or towards her maintenance and education, until she shall attain her age of 21, or shall be married; provided further, that it shall be lawful for my said trustees or trustee for the time being, in case my said daughter shall marry, (so as such marriage, if she shall be under the age of 21 years, shall be had with the consent (8) of her guardians or

then to pay the testator's mother the dividends.

And after her decease to raise the sum of —£. for ——— and to divide the surplus among ——— and ———.

Proviso, in case of the daughter's being a minor at testator's death, for applying the dividends for her maintenance until her coming of age.

(8) Conditions in restraint of marriage are considered with some jealousy by the Courts, and therefore a strict performance has sometimes been dispensed with: as where only the major part of the guardians have consented, 1 Atk. 375. where the consent has been conditional, 2 Atk. 264. 2 Vez. 535, where only a tacit or implied consent has been given, 2 Vern. 580. And where the condition has been general, it has been construed with a limitation to the period of minority, 2 P. Wms. 547. Where the consent has been once given, a second marriage has been held good without consent, 3 Bro. C. C. 128. And even where the party has married once between the will and testator's death, the restriction has been adjudged not applicable to a second marriage, 3 Vez. Jun. 227.

Proviso for
changing trus-
tees and for
their indemnity.

Change of Trust

guardians,) to raise by and out of the said principal money, stocks, funds, or securities, the sum of —l. of lawful money of Great Britain, and to pay the same upon or immediately after such marriage, to such person or persons, and for such purposes, as my said daughter by any writing or writings under her hand, attested by two or more credible witnesses, shall direct; and I give the following legacies, that is to say, I give to my mother 300l.; to my three sisters 100l. a-piece; to my nephew, J. H——, 300l.; to my niece 100l.; to Mrs. B—— and her daughter 20l. a-piece, for a ring; to Mr. N—— 50l.; and to each of my executors, hereinafter appointed, 50l. And I appoint the said ——— executors of this my last will and testament. Provided, and my will is, that if the said, &c. or any of them, or any of their heirs, executors, administrators, or assigns, or any trustees or trustee to be appointed in the stead or place of any of them, as hereinafter is mentioned, shall die, or be desirous of being discharged from, or refuse, or decline to act, or become incapable of acting in the trusts of this my will, before the same respectively shall have been fully executed, performed, or discharged, then, and in such case, and so often as the same shall happen, it shall and may be lawful to and for the person or persons who for the time being shall be entitled to the dividends or interest of the residue of my personal estate, if such person or persons shall be of full age, and if not, then for the guardians or guardian, of such person or persons, by any writing or writings under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees, in the stead or place of him or them so dying, or desiring to be discharged, or refusing, or declining to act, or becoming incapable of acting as aforesaid: and that when and so often as any new trustee or trustees shall be nominated or appointed as aforesaid, all the trust-estates, and premises which shall then be vested in

the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable of acting as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, assigned, and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, and premises, then in such new trustee only upon the same trusts as are hereinbefore declared or expressed, of or concerning the same trust estates, and premises respectively, the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or be incapable of acting as aforesaid, or such of them as shall be then subsisting or capable of taking effect. And my further will is, that all and every such new trustee or trustees shall or may in all things act and assist in the management, carrying on, and executing of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustees or trustee of the same trust estates, and premises, if there shall be any such continuing trustees or trustee, and if not, then by himself or themselves respectively, as fully and effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, selling, conveying, calling in, laying out and investing, giving and signing receipts, indemnifications, and discharges, to purchasers and others, and all other powers and authorities whatsoever, as if he or they had been originally in and by this my will nominated a trustee, or the trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, or as the trustee or trustees named in this my will, his

*Trustees - a
Indemnity §*

or their heirs, executors, administrators, or assigns, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of this my will, if then living and continuing to act in the trusts hereby reposed in him or them, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. And my will further is, that the several trustees hereby appointed or to be appointed in pursuance of this my will, or any of the heirs, executors, administrators, or assigns, of them or any of them, shall not be charged or chargeable with any more of the said trust monies, and premises, than they respectively shall actually receive, and that one of them shall not be answerable or accountable for the others or other of them, or for the acts, receipts, neglects, or defaults of the others or other of them, but each one for his own acts, receipts, neglects, or defaults only; nor shall they, neither or any of them, be answerable or accountable for any banker, broker, or other person, with whom any of the said trust monies may be deposited for safe custody or otherwise, in the execution of the said trusts, nor for the insufficiency or deficiency of any stocks, funds, or securities, in or upon which any of the said trust monies may be invested, in pursuance of and in conformity to this my will, or for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they the said several trustees so appointed, or to be appointed, shall and may, by and out of the monies which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and re-imburse himself and themselves, and allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them may respectively sustain or expend, or be put unto, in or about the execution of the trusts aforesaid, or in any mat-

ter relating thereto. And lastly, I do hereby revoke all former wills by me at any time heretofore made, and declare this only to be my last will and testament.

A Will disposing principally of real Property in Shares, among Children and Grandchildren.

THIS is the last will and testament of me J. C. of N. in the parish of S. in the county of Middlesex. I give and devise unto J. F. and W. A. and J. C. all my freehold messuages, lands, tenements, and hereditaments whatsoever, to hold unto them the said J. F. W. A. and J. C. and their heirs, to the uses upon the trusts, and for the intents and purposes, and under and subject to the powers, provisos, limitations, and declarations hereinafter expressed, limited, and declared, of and concerning the same, that is to say, as to, for and concerning all that my freehold messuage or tenement in which I now reside, with the chaise-house, wood-house, stable, and garden thereunto belonging, and also all that my freehold messuage or tenement, being No. 5, in N. street aforesaid, with the garden behind the same, now in the tenure of ———, and also all that my freehold messuage or tenement, being No. 4, in N. street aforesaid, with the garden thereunto belonging, now in the tenure of Mr. H. together with all the fixtures and appurtenances to the said messuage or tenement and premises, or any of them, belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my wife Sarah, upon trust from time to time, during the continuance of that estate, to cause the same premises to be kept in good substantial repair, and to

Limitation creating a tenancy in common, in tail, with cross remainders.

be kept insured from loss or damage by fire, to the full value thereof, or as near thereto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the same premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trust hereinbefore declared upon trust to pay unto or empower my said wife to receive the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purpose aforesaid, to and for her own use and benefit; and from and immediately after the decease of my said wife, to the use of my four children, William, Henry, James, and Elizabeth, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of any of such children, then as to the share or shares of him, her, or them, whose issue shall so fail, to the use of the others of them, as tenants in common, and the several heirs of their respective bodies, and in case there shall be a failure of issue of the bodies of all such children but one, then to the use of such one child, and the heirs of his or her body, and in default of such issue, to the use of my own right heirs for ever. And as to for and concerning all those my three freehold messuages or tenements, numbered 1, 2, 3, situate in N. street aforesaid, and now in the several occupations of —, with the gardens and appurtenances thereunto respectively belonging, to the use of the said trustees, their heirs, and assigns, during the natural life of my said son William, upon trust, to support and preserve the contingent remainders hereinafter limited, from being defeated or destroyed, and upon further trust from time to time, during the continuance of that estate to cause the said premises to be kept in good and substantial repair, and to be kept insured from loss or damage by fire, to the full value thereof, or as

near thereunto as may be, so as that in case any such loss or damage shall happen, the money to be received upon or by means of such insurance, may be laid out in reinstating the same, and to retain or apply so much of the yearly rents, issues, and profits of the said premises as shall be necessary for the respective purposes aforesaid; and subject and without prejudice to the trusts hereinbefore declared, to pay the rents, issues, and profits of the same premises, or so much thereof as shall remain unapplied for the purposes aforesaid; for the use and benefit of my said son William, during his natural life, and from and immediately after the decease of my said son William, to the use of all and every the child and children,—[Same clause as before for creating a tenancy in common, in tail with cross remainders]—and in default of such issue, to the use of my said sons Henry and James, and daughter Elizabeth, as tenants in common, and the several heirs of their respective bodies,—[Same clause as before, making a tenancy in common, in tail, with cross remainders]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my seven freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, and 7, situate in ———, with the out-houses, gardens, and appurtenances thereunto respectively belonging, as the same are now in the several occupations of ———, to the use of ——— and ———, their heirs and assigns, during the natural life of my said son Henry, upon trust to support and preserve the contingent remainders hereinafter limited from being defeated or destroyed, and upon further trust from time to time (same clause for keeping premises in repair and insuring from fire, &c.) and subject and without prejudice to the trusts hereinbefore declared upon trusts to pay such rents, issues, and profits of the premises or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said son Henry, for his personal support and maintenance,

Proviso against
charging or in-
cumbering.

for which his receipts in writing, signed with his proper hand shall alone be a sufficient discharge. Provided, and my will is, that in case my said son Henry shall alien, or charge, or attempt to alien or charge such his beneficial interest, in such rents, issues, and profits, as aforesaid, or any part thereof, then and from thenceforth he shall cease to have any benefit thereout, and such rents, issues, and profits, as he my son Henry would otherwise have been entitled to, shall for the then residue of his life, go and be paid unto the person or persons who for the time being shall be intitled to the remainder or reversion of the same hereditaments and premises, expectant on the determination of the said estate so limited to the use of the said trustees, their heirs, and assigns, during the life of my said son Henry, as aforesaid; and from and immediately after the decease of my said son Henry, to the use of all and every the child and children of the body of my son Henry, lawfully to be begotten, as tenants in common—[as before with cross remainders]—and in default of such issue, to the use of my said sons William and James, and daughter Elizabeth, as tenants in common,—[as before]—and in default of such issue, to the use of my own right heirs for ever. And as to, for, and concerning all those my 8 freehold messuages or tenements, numbered 1, 2, 3, 4, 5, 6, 7, 8, situated, &c. with the appurtenances thereto respectively belonging, and now or late in the several occupations of, &c. to the use of the said trustees, their heirs and assigns, during the natural life of my said daughter Elizabeth, upon trust to support and preserve, &c. and upon further trust (to keep premises in repair and insured from fire, as before) and subject, and without prejudice to the trusts hereinbefore declared upon trust to apply such rents, issues, and profits of the said premises, or so much thereof as shall remain undisposed of for the purposes aforesaid, into the proper hands of my said daughter, for her sole and separate use and benefit, exclusively of any husband

Clause giving
the exclusive
enjoyment to
a married
daughter.

with whom she may intermarry, and so as the same may not be subject or liable to the power, controul, debts, or engagements of any such husband, and her receipt alone to be a sufficient discharge for the same, notwithstanding any coverture she may be under. And in case my said daughter shall at the time of my death be in her minority, and unmarried, then to apply the same for or towards her maintenance and education, or if my said wife shall be living, to pay the same over to her my said wife, in order that she may apply the same for that purpose, and from and immediately after the decease of my said daughter, to the use of all and every the child and children of the body of my said daughter, lawfully to be begotten, as tenants in common—[limitation to her children as before, remainder over on failure of issue to testator's sons in the same manner as before]—provided always, and my will is that it shall and may be lawful to and for the said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, by indenture or indentures under their or his hands and seals, or hand and seal, respectively to demise or lease such part or parts of the said vacant ground as may not be built upon at my death, unto any person or persons who may be willing to build upon the same or any part or parts thereof, for any term or number of years not exceeding 61 years from the making thereof respectively, yet so as that no erection or building shall be erected, whereby the said street, called St. James's Street, shall be rendered of less width in any part than 30 feet, and to demise or lease all or any of the residue of the hereditaments herèinbefore devised, unto any person or persons, for any term or number of years not exceeding 21 years from the time of making thereof, so as on every such lease so to be made, whether for building or not, there be reserved and made payable the best and most improved yearly rent or rents that can be reasonably had or gotten for the hereditaments and premises thereby demised, to be incident to and go

Power to make building-leases and common leases.

along with the immediate remainder or reversion of the said premises, without taking any fine, premium, or foregift, for the making or granting any such lease or leases respectively, and so as that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby reserved, and so as that no lessee or lessees be by any such lease or leases authorized or empowered to commit waste, or exempted from punishment for committing the same, and so as the lessee, or respective lessees to whom any such lease or leases shall be so made, shall and do execute a counter-part or counter-parts thereof respectively, and enter into a covenant for payment of the rent or rents so to be reserved. And as to, for, and concerning all those my freehold messuages or tenements, situated in ———, and all those my freehold messuages, situate in ———, and all other my hereditaments hereinbefore devised to the said (trustees) and their heirs, whereof no use is hereinbefore limited or declared, with their appurtenances, to the use of them, the said trustees, their heirs and assigns, for ever, but nevertheless upon the trusts hereinafter declared concerning the same: and I give and bequeath my leasehold messuage and tenement, situated behind the three last mentioned messuages, and also my leasehold messuages and tenement, situate in ———, with their respective appurtenances, unto the said trustees, their executors, administrators, and assigns, for all such term or terms of years, as I shall have therein at the time of my decease, but nevertheless upon the trusts hereinafter declared concerning the same. And as to, for, and concerning as well the freehold messuages, tenements, and hereditaments hereinbefore lastly mentioned, or referred, to as the said leasehold messuages, tenements, and premises, I will and declare that the trustees or trustee thereof respectively, for the time being, do and shall, so soon as conveniently may be after my decease, sell, and absolutely dispose of the same, together or in parts, by public auction or private con-

Direction to
trustees to sell
freehold and
leasehold pro-

tract, as to them or him shall seem expedient, for the best price or prices that can be reasonably procured for the same; and as to the money arising by and from such sale or sales, and also as to the clear yearly rents, issues, and profits, arising from the said freehold and leasehold premises so hereinbefore directed to be sold as aforesaid, in the mean time, until the same shall be sold, I will and declare that the same respectively shall be deemed to be part of my personal estate, and I further will and direct that the receipt or receipts of the said trustees, their heirs, executors, administrators, or assigns, for the money arising by any such sale or sales, shall be a good discharge or discharges for the same, or so much thereof as shall be expressed to be received; and that the purchaser or purchasers of the same several hereditaments and premises, or any part thereof; his, her, or their heirs, administrators, or assigns shall not be answerable for any loss, misapplication, or non-application thereof. And as to all my goods, chattels, and personal estate, not by this my will specifically disposed of, I give the same unto the said trustees, upon trust, in the first place to pay thereout all my just debts, (including all such ground-rents and premiums of insurance as may be owing from me at the time of my death,) and my funeral and testamentary charges; and in the next place, the pecuniary legacies given by this my will; and after making all such payments, to lay out so much of the residue as may be necessary in finishing any messuages or other buildings which may happen to be building by me on the said vacant ground, at the time of my death; and to lay out the surplus, if any, in the purchase of 3 per cent. consolidated bank annuities, in the names of them the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor; and as to such bank annuities, I will and direct that they the said trustees or trustee thereof, for the time being,

perty, and to convert all into personalty, to pay thereout funeral and testamentary charges, and premiums of insurance; to finish certain houses not completed, and to lay out the surplus in the funds, to accumulate till the youngest son arrives at 21, and then to divide it among the children.

do and shall place out the dividends or interest arising thereupon, from time to time, until my said son James shall attain the age of 21 years, (or in case he shall die before that age, until the period shall arrive when he would, if living, have attained that age,) in the purchase of like annuities, so as to cause as great an accumulation of stock as may be ; and when and so soon as my said son James shall attain the said age, or the period shall arrive when he would, if living, have attained that age, then to transfer one fourth part of such bank annuities as shall have been so purchased as aforesaid, unto my said son William, his executors, or administrators ; one other fourth part unto my said son Henry, his executors, or administrators ; one other fourth part unto my said daughter Elizabeth, her executors, or administrators ; and the remaining fourth part unto my said son James, his executors, or administrators ; and I give and bequeath to my said wife all my household goods and furniture, plate, rings, watches, china, ornaments, linen, and wearing apparel, books on the subject of divinity, prints, and such of my drawings as are in frames. And I do hereby will and declare that such stock in the public funds as may at my death be standing in the joint names of my said wife and myself shall be hers absolutely. I give and bequeath to my son Henry all my books, manuscripts, papers, and drawings, (except those given to my wife, and such books as contain matters relating to my business unfinished, and my books of account, and books relative to my estates, all which I direct shall be retained by my executors), I also give to my son Henry all my boxes, containing books and papers relative to measuring, with their contents, utensils, and implements used in my business. I will that my executors do pay out of my personal estate 200*l.* for the board and education of my nephew H. T. until he shall be fit to be put out apprentice, and then that they do pay the further-

sum of 200*l.* with him as an apprentice fee(9). I give to my son William 20*l.* to be laid out for him as my executors hereafter named shall think proper. I forgive my son-in-law W. T. the debt of 100*l.* which he owes to me, and direct my executors to deliver up to him the bond whereby the same is secured to me, to be cancelled (10). I do hereby nominate, constitute, and appoint the said J. A. W. A. and J. C. executors of this my last will and testament; and I give to them the sum of 50*l.* each, as some compensation for their care and trouble in the execution, of the trusts hereby in them reposed, and direct the same to be paid to, or retained by them, as soon as conveniently may be after my decease. I give and bequeath to my brother and to my two sisters and to my wife's son ——— the sum of 20*l.* each, to be paid to them respectively, as soon as conveniently may be after my decease. And I appoint my said wife guardian of such of my children as shall be under the age of 21 years at my decease; and after her decease I appoint my said trustees and the survivors or survivor of them the guardians or guardian of such of my children as may be then minors until they respectively shall arrive at the age of 21 years, and I do direct—[clause indemnifying the trustees, &c.*]

Appoints his
wife guardian.

In witness, &c.

* See before in page 528, et seq.

(9) If a legacy be given for the benefit of an infant in one way, and it cannot be applied in that way, it may be applied for his benefit in another way, as if it be to put him into orders, and he becomes a lunatic;—and where a legacy is given as an apprentice fee, if the boy is not put out apprentice, he will be entitled to this legacy when he comes of age. 5 Vez. jun. 461. *Barton v. Cooke*.

(10) If W. T. should die in the testator's life-time this legacy will not lapse. 1 Vez. jun. 49, 1 P. Wms. 83. But it is to be observed, that such a legacy will not prevail in equity against creditors; it is good, however, against executors, and if an action be brought for it by executors the court will grant an injunction. 3 Atk. 581. 1 P. Wms. 86. (n. 2).

A will disposing of real and personal Estate by way of Provision for Children.

Directions for
burial.

THIS is the last will and testament of me, S. K. of ———, &c. I desire to be buried in the vault which I have lately made in the parish church of ———, in the said county, and I earnestly request that my wife and son and all those who for the time being shall be entitled to the rents and profits of my messuages, lands, tenements, and hereditaments hereinafter devised, will pay due attention to the keeping up of those graves and grave-stones of my family, which are in the church-yard of F. in the said county, and to which grave-stones I have lately put head and foot stones. I give and bequeath unto my dear wife, and to my only son S. K. and to my son in law M. R. and to my only daughter R. M. D. his wife, the sum of ———l. a piece for mourning; and for the like purpose I give unto C. my son's wife, the sum of ———l. and to her two sons, U. S. W. and I. S. W. ———l. a piece, and to my niece A. L. the sum of ———l.; I also give and bequeath unto my said wife all the ornaments of her person, and all my jewels, plate, linen, china, and all my household goods and furniture whatever and wheresoever, and all my books, and all my horses and other cattle, and my chaise, carts, carriages, and implements of husbandry, and also all my stock of wines and other liquors whatever(1), to hold to her as her own abso-

*Furniture &c.
to Wife - S*

What articles
comprehended
under different
words and
phrases.

(1) If, as in some wills, the word 'effects' happens to be inserted at the end of a particular enumeration, it will be restrained to articles ejusdem generis with those specified, even though the consequence should be a residue undisposed of; 13 Vez. jun. 59, Rawlings v. Jennings. So 'goods and chattels,' though of legal import wide enough to carry all personal estate, yet coming after 'furniture,

lute property; I also give to my said wife the use and enjoyment of all my pictures, prints, and draw-

&c.' are restrained to articles ejusdem generis; 11 Vez. jun. 666, *Stewart v. the Marquis of Bute*. And the same rule holds where the words are 'other things;' 1 Eq. Abr. 201, pl. 13. And if a silversmith bequeaths all his *furniture*, books, goods, and chattels, his stock in trade will not pass, though the plate used in his house as household furniture would pass; *ibid.* But it is held, that if a man bequeaths his house and all *that is in it*, *cash* passes; but not *promissory notes and securities*; and it is a question whether bank notes would be considered as cash for this purpose; *ibid.* A bequest of all testator's *goods generally* will pass bonds, for they are bona notabilia; but bonds, being choses in action, admit of no locality, and therefore a bequest of goods in a *particular place* will not pass *bonds*, which happen to be there at the testator's death; 1 Vez. 273, *Chapman v. Hart*, 1 Bro. C. C. 127, *Moore v. Moore*. A bequest of household goods extends to all household goods purchased after the will, and which are in the house at the testator's death, and plate commonly used in the family will pass as household goods, 1 P. Wms. 424; and parol proof ought not to be received to disprove such intention, 2 P. Wms. 420. So under a bequest of a library after-bought books will pass, 1 P. Wms. 597, *Ambl.* 641. By a bequest of all household goods and all implements of household, malt, hops, beer, ale, and other victuals in the house do not pass, 3 P. Wms. 334. And note, that if a house be given for the life of the devisee *with* the furniture, it has been held that the devisee can have no greater interest in the latter than was expressly given to him in the former, 1 Atk. 470, 2 Atk. 321. A bequest to a wife of the household goods entitles her to the use of them anywhere, or even, it has been said, to let them to hire, 2 Atk. 217, and therefore where this is not meant, there should be restraining words. A library of books will not pass as furniture, 3 Atk. 302, *Ambl.* 605. A bequest of household furniture includes only what is for domestic use, and not what is for trade or merchandise, 1 Vez. 97, 2 P. Wms. 302. So if a man deals in *china*, those pieces will not pass as furniture which are the goods of his shop, 2 Vez. 430. Under the words 'other goods and chattels whatsoever,' though coming after specified articles of a different description, running horses have been held to pass, *Ambl.* 612. '*All my pictures*,' will pass pictures purchased after the will, *Ambl.* 641, 1 P. Wms. 597, 2 Vern. 538. '*All my clothes and linen whatsoever*,' has been held to pass only body linen, 3 Bro. C. C. 311. Under a bequest of the use of a house, with all the furniture, stock of carriages and horses, and other live and dead stock, for life, plate was held to pass; but not wine and books, 3 Vez. jun. 311. By a legacy of a cabinet of curiosities, ornaments of the person though shewn as part of it shall not pass.

Charitable be-
quests.

ings, during her life, and from and after her decease I give to my daughter R. M. D. the picture of herself; but the rest of my pictures, and all my prints and drawings I give to my said son S. K. I give and bequeath to I. N. of T. in the said county, esquire, and to C. B. the younger, of W. in the said county, esquire, the sum of ———l. a piece, to be laid out in the purchase of some small piece of plate, to be kept by them respectively as a memorial of the friendship subsisting between us. I order and direct the sum of ———l. to be divided as my wife shall think proper, or in case of her death as my said son shall think proper, among such of the poor persons resident in or belonging to the parish of St. L. in I——— aforesaid, where I live, as shall happen to be upon my Christmas list, and to have received a small donation by my order at the Christmas preceeding my death. I likewise order and direct the sum of ———l. to be divided or given as my wife shall think proper, to or amongst

Testator gave all his plate and linen in his house at S. with the lease, to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house; the plate happened to be at B. the country house, at his death, yet it was held to pass to the wife, 4 Bro. C.C. 537. A devise from the husband to the wife of the use of household goods, furniture, plate, jewels, linen, &c. for life, or widowhood, and afterwards to children, does not exclude her from her paraphernalia, 2 Atk. 217, and she may use them any where, unless they are annexed to the dwelling-house as heir-looms, and then they cannot be used elsewhere; but it should seem there is nothing to prevent her letting them, together with the house; see Fearn. Ex. dev. 36. If she put them in pawn, trover lies for the remainder-man against the pawnee, without paying him the money advanced upon them, 2 T. R. 376, Hoare v. Parker, and see Hartop v. Hoare, 3 Atk. 44.

Where a man devised all his goods, leases, estates, mortgages, debts, ready money, plate, and other goods whereof he was possessed, to his wife, after his debts and legacies paid, and made his wife executrix, it was held that his fee simple estate in a mortgage did not pass, for by the associated words it plainly appeared that he meant only by this clause to give things personal; see Cro. Car. 447, 449, and see Cole v. Rawlinson, Lord Raym. 831.

any poor family or families of the aforesaid parishes of ——— and ——— which shall seem to her to be most deserving of such reward or assistance: and the rest, residue, and remainder of my personal estate not hereinbefore specifically bequeathed, after payment of my debts, legacies, funeral, and testamentary charges, I give and bequeath to the said G. H. and C. B. their executors, administrators, and assigns, upon and for such and the like trusts, intents, and purposes as are hereinafter mentioned and declared respecting the rents, issues, and profits of the hereditaments hereinafter given and devised to them for the term of 500 years, during the continuance thereof. I nominate and appoint my said wife M. K. sole executrix of this my last will and testament, thinking it may be more readily executed by one person than by two, yet I earnestly request and hope that my said son will to the utmost of his power aid and assist his mother in the due execution thereof. And as to, for, and concerning my messuages, farms, lands, tenements, and hereditaments next hereinafter mentioned, (that is to say) ——— I give, devise, and confirm the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and from and after her decease unto and to the use of my said son S. K. his heirs and assigns, for ever: And as to, for, and concerning my messuage or tenement, farm, lands, and hereditaments in C—— aforesaid, now in the occupation of ———, I give and devise the same, with their respective appurtenances, unto and to the use of my said wife for and during the term of her natural life; and immediately from and after her decease then as to, for, and concerning the same premises, and from and immediately after my own decease as to, for, and concerning the following estates, (that is to say) my freehold messuages, &c. [various parcels and descriptions of freehold property] I give and devise the same, with

A term of 500
years created.

Trusts of the
term declared.

their respective appurtenances, unto and to the use of them the said G. N. and C. B. their executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day of my decease, and from thence next ensuing, and fully to be complete and ended without impeachment of waste; but nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and declared concerning the same term, and (subject as aforesaid) from and immediately after the determination of the said term of 500 years, and in the mean time subject thereunto and to the trusts thereof, unto and to the use of the said S. K. and his assigns, for and during the term of his natural life without impeachment of waste, and from and after his decease [to the children of the said S. K. the son in strict settlement, remainder to the testator's right heirs]. And as to, for, and concerning the said term of 500 years hereinbefore limited to the said G. N. and C. B. their executors, administrators, and assigns as aforesaid, I will and declare that the said G. N. and C. B. their executors, administrators, and assigns, do and shall stand and be possessed of the messuages, lands, and hereditaments comprized therein, upon the trusts following, (that is to say) upon trust that they the said trustees, or trustee for the time being, do and shall with and out of the respective rents, issues, and profits of the said hereditaments and premises therein comprized, or by mortgage or sale of a competent part of the same premises for all or any part of the said term, or by both of those means (2), raise and levy such sum and sums of money as shall be necessary for paying so much of my debts, lega-

(2) These last words seem to be proper, since without such words, or the addition of the plural words "sales and mortgages," it might be doubted whether the trustees having raised the money by mortgage could afterwards sell to pay off that mortgage, however beneficial such an arrangement might be; see 12 Vez. jun. 48.

ries, funeral, and testamentary charges as my personal estate, not specifically bequeathed, may happen to fall short in payment of, and do and shall apply such money so to be raised in discharge thereof accordingly, and subject thereto, upon trust that they the said trustees, or trustee for the time being, do and shall by both or either of the aforesaid means raise, levy, and pay the following clear annual sum of money during the life of my said daughter S. D. (that is to say) the annual sum of ———l. (if my wife shall survive me) as long as my said daughter and my said wife shall both be living, and in case my said daughter shall survive my said wife, then the annual sum of ———l. during the residue of the life of my said daughter, but if my said wife shall die in my life-time, then the said annual sum of ———l. to commence from the time of my death; the said annual sum of ———l. or ———l. as the case shall happen as aforesaid, to be paid by equal half-yearly payments, on the 24th day of June and 26th day of December in every year, clear of taxes and without deduction, the first payment of the said annual sum of ———l. to be made on such of the said days as shall first happen next after my decease, in case my said wife shall be living at such day of payment, and the first payment of the said annual sum of ———l. to be made on such of the said days as shall first happen next after the decease of the survivor of me and my said wife; and upon trust that they the said trustees, or trustee for the time being, do and shall pay such of the said annual sums of ———l. and ———l. as shall be subsisting or ought to be raised as aforesaid, unto such person or persons only, and for such intents and purposes only as my said daughter, by any writing or writings under her hand, shall direct or appoint, notwithstanding her present or any future coverture, and for want of such direction or appointment then do and shall, [for the separate use of the daughter, vide ante page 535,]

To make up the deficiency of the personal estate in paying funeral and testamentary charges, and debts and legacies.

And subject thereto to pay an annual sum to his daughter, to be increased after the death of the testator's widow, and to be paid to her separate use.

And after the death of the daughter to raise portions for her children, to vary with the number and to become vested as they attain their ages.

and in case my said daughter shall have one or more child or children then upon trust that they the said G. N. and C. B. their executors, administrators, and assigns, do and shall, after the decease of my said daughter, but not before, and when and as any such child or children shall attain their respective age and ages of 21 years, (if my said daughter shall then be dead,) by both or either of the aforesaid means (but subject and without prejudice to the trusts hereinbefore declared concerning the same term) raise and levy such sum or sums of money, for the portion or portions of such child or children, as is or are hereinafter mentioned, (that is to say) if there shall be only one child of my said daughter, who shall attain the said age of 21 years, then the sum of —*l.* for the portion of such one child: If there shall be two such children, and no more, who shall live to attain that age, then the sum of —*l.* for the portions of such two children, the sum to be equally divided among them; and if there shall be three or more such children, who shall live to attain that age, then the sum of —*l.* for the portions of such three or more of them, the same to be equally divided between or among them; such portion or portions as is or are hereby provided for such child or children, to become a vested interest, or vested interests, in him, her, or them respectively, as and when he, she, or they respectively shall attain the age of twenty-one years, after the decease of my said daughter, to be paid at the end of six calendar months next after their attaining such age and ages, with interest for such six months, at the rate of —*l.* per cent. per annum. But as to such of them as shall attain that age in the life-time of my said daughter, the payment of their portions shall be postponed until the end of six calendar months, next after her decease, and to be paid with like interest for such six last-mentioned months: and upon this further

trust, that the said G. N., and C. B., their executors, administrators, or assigns, do and shall, by both or either of the aforesaid means, raise, levy, and pay, such annual sum or sums of money, for or towards the maintenance and education of such child or children of my said daughter, as shall be under the age of twenty-one years at her decease, as shall be equal to the interest of his, her, or their expectant portion, or respective portions, at the rate of ——— per cent. per annum, until the same shall respectively become vested as aforesaid. And upon this further trust, that if my said daughter shall not have a child, or having any such child or children, they shall all die under the age of twenty-one years, so as not to become entitled to receive the portion and portions hereinbefore provided for them as aforesaid, then upon trust, that the said trustees or trustee, for the time being, do and shall, by both or either of the aforesaid means, (but subject and without prejudice as aforesaid) raise and levy such sum or sums of money, not exceeding in the whole, the sum of — £. of lawful money of Great Britain, as my said daughter by any deed or deeds, writing or writings, with or without power of revocation, under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or by any writing in the nature of her last will and testament, to be signed and published in the presence of, and attested by three or more such witnesses, shall notwithstanding her present or any future coverture, think fit to direct and appoint, and do and shall pay such sum or sums, if any, as shall be so directed to be raised, not exceeding the said sum of — £. as aforesaid, unto or amongst such one or more of the present or any other son or sons, daughter or daughters, of my said son S. K., at such time or times, and in such share and shares, manner and form, as my said daughter shall by the same or any other deed, writing or writings, under her hand and seal,

And in the mean time, to raise by way of maintenance for each, an annual sum equivalent to the interest of their respective portions.

And if no child to take such benefit, then to raise a gross sum to be disposed of among specified persons, according to the daughter's appointment.

Receipts of trustees to be discharges, and the mortgagees and purchasers not to be answerable for the application of the mortgage or purchase monies.

Trustees empowered with consent of the son to apply necessary sums out of the rents and profits in repairing and rebuilding.

And subject to the trusts above-mentioned, to invest the surplus rents, and profits, in the funds, during the first 21 years of the term, after testator's death.

with or without power of revocation so attested as aforesaid, or by such last will and testament, or writing in nature thereof, as aforesaid, direct or appoint. And in order to facilitate any mortgage or sale or mortgages or sales of the same messuages, farms, lands, tenements, and hereditaments, or any part or parts of them, for any of the trusts and purposes aforesaid, I hereby declare, that the receipt or receipts of the said trustees or trustee for the time being, shall be a good and sufficient discharge to the mortgagee or mortgagees, purchaser or purchasers, of any of the same messuages, farms, lands, tenements, and hereditaments, or of any part or parts thereof, for his, her, or their mortgage or consideration-money, or for so much thereof as in such receipt or receipts shall be expressed to be received, and that such mortgagee or mortgagees, purchaser or purchasers, his, her, or their executors, administrators, or assigns, shall not afterwards be accountable for any misapplication or non-application thereof, neither shall he, she, or they respectively be concerned to enquire into the necessity of making any such mortgage or sale for any of the purposes aforesaid. Provided, and my will further is, that it shall be lawful for the said trustees or trustee, for the time being, (with the consent of my said son, signified in writing under his hand, if living, and if not, then at the discretion of them or him my said trustees or trustee,) to apply so much of the rents, issues, and profits of the premises comprized in the term, as to them or him shall seem expedient, in or for the purposes of repairing or rebuilding any of the messuages or buildings upon the said farm and lands, or improving the same, or any of them, and also to fell, cut down, and dispose of any of the timber or trees, growing or being thereupon, for all or any of the last-mentioned purposes, and subject to the trusts, interests, and purposes, hereinbefore declared of and concerning the messuages, farms, lands, tenements, and hereditaments, comprized in the said term of 500 years, I declare my will and mind to be that the said trustees or trustee

for the time being, do and shall, during the first 21^{*} years of the said term of 500 years, to be computed from the 5th day of April, or 10th day of October, next preceding my death, lay out, and invest, (with the consent of my said son, if living, in writing under his hand, and if not, then at the discretion of such trustees or trustee), the residue and clear surplus of the yearly rents, issues, and profits of the said premises, remaining after paying such the said annual sums of ———l. or ———l., for the separate use of my said daughter, and such annual sum as shall for the time being be applicable for such maintenances as aforesaid, and the interest of any such portion or portions hereinbefore directed to be raised, as shall be carrying interest, and also of any such mortgage or mortgages as may be made in pursuance of the trusts hereinbefore declared, and after application of such sum or sums of money as it may be thought proper to dispose of for such rebuilding, repairing, or improving, as aforesaid, in the public stocks or funds of Great Britain, or in or upon securities of that government, or real securities in England, at interest, and in like manner, from time to time to invest the dividends, interest, or annual proceeds of such stocks, funds, or securities, so as within that period to produce as great an accumulation of capital as reasonably may be in the nature of compound interest. Provided, nevertheless, and I declare my mind and will to be, that such investments shall cease at the end of 10 or 15 years of the said term of 21 years, if my said son shall in his life-time so direct the same, by any writing under his hand, to be attested by two or more credible witnesses, and then I will and direct that the said trustees or trustee for the time being, do and shall stand possessed of and interested in such stocks, funds, or securities, as shall have been so from time to time purchased, upon the

* Vide post, the note on the Accumulation Act.

Proviso for the
ceasing of the
term.

trusts hereinafter declared concerning the same. Provided that when, and so soon as all and every the trusts hereinbefore declared concerning the said term of 500 years, shall in all things have been fully performed, satisfied, or discharged, or shall have become incapable of being carried into execution, and they the said G. N., and C. B., and each of them, and the executors, administrators, and assigns, of them, and each of them, shall be fully reimbursed and satisfied, all costs, charges, and expenses, occasioned by or relating to the trusts of the said term of 500 years, then the same term or so much as shall remain undisposed of for the purposes aforesaid, shall cease, determine, and be absolutely void to all intents and purposes whatever, (any thing herein, &c.) Provided also, and I hereby declare that it shall and may be lawful to and for my said son S. K., from time to time, and at all times during his natural life, and after his decease, to and for the person or persons who for the time being, shall, under and by virtue of the limitation herein-before contained, be entitled to the hereditaments comprized in the said term of 500 years, either in possession or in remainder after the determination of the same term, if he, she, or they shall have attained the age of 21 years, and if not then, for his, her, or their guardian or guardians, (power to lease, see before p. 535). And as to, for, and concerning all my copyhold messuages, farms, lands, tenements, and hereditaments, with their respective appurtenances not hereinbefore disposed of for the benefit of my said wife, during her life, with remainder for the benefit of my said son and his heirs, I give and devise the same unto and to the use of the said S. K. my son, his heirs, and assigns, for ever, yet nevertheless upon such trusts, intents, and purposes, as will correspond with the uses, trusts, interests, and purposes hereinbefore expressed, and declared of and concerning my said freehold messuages, farms, lands, tenements, and hereditaments comprized in the term of 500 years,

either in possession or in remainder, after the decease of my said wife, and with which estates such copyhold premises are respectively held and enjoyed, and under and subject to such and the same powers, provisos, and declarations, or as near thereto as may be, and the different nature of the tenure and the rules of law and equity will admit of. And as touching such stocks, funds, and securities as shall have been so purchased as aforesaid, I will and declare that the said trustees thereof for the time being, do and shall stand possessed of, and interested in, the same, upon the trusts following, that is to say, upon trust that they or he do and shall pay unto, or empower my said son, (if living,) or his assigns to receive the dividends or interest thereof during his natural life, and from and immediately after his decease, (or in his life-time, if he shall so direct, by any such deed or writing as hereinafter is mentioned,) do and shall pay or transfer such stocks, funds, or securities unto such one child, or to and amongst such two or more of the children of my said son (other than and except an eldest or only son for the time being) at such age or time, and if more than one, at such ages or times, in such shares and proportions, and in such manner and form as my said son by any deed, &c. shall direct or appoint; and in default of such direction or appointment, then the same shall become vested in such two or more of the children of my said son (other than and besides such eldest or only son) as shall attain the age of 21 years, in equal shares, but if there shall be no more than one such child (other than and besides such eldest or only son) who shall attain such age, then one moiety only thereof shall vest in such child, and the other moiety shall be considered as having vested in my said son, and be paid or transferred accordingly to his executors, administrators, or assigns; and in case there shall be no child of my said son (other than, &c.) who shall attain the said age, then the whole of such

Trusts of the accumulated stock.

To permit the son to receive the dividends for life, and after his death to go according to his appointment among his younger children.

stocks, funds, or securities, shall be considered as having vested in my said son, and be paid or transferred accordingly to his executors, administrators, or assigns ; and as to any dividends or interest which may arise in respect of such last-mentioned portion or portions from the decease of my said son, until the vesting thereof, I will and direct that such dividends or interest shall be invested in such stocks, funds, or securities, (to accumulate as before).



A Will comprising various Dispositions of real and personal Estate, partly of Testator's own Estate, and partly in Performance of various Trusts and Obligations imposed on him by antecedent Settlements.

Recital of provisions and limitations of real and personal property, under settlements by deeds and wills.

This is the last will and testament of me J. N. of ———. Whereas, under and by virtue of the settlement made previous to my marriage with Mary, my wife, (then Mary S.) certain hereditaments at W———, (whereof she was seised in fee simple) stand limited to the use of me for life, with remainder to the use of the trustees therein named, and their heirs, during my life, in trust to preserve the contingent remainders; remainder to the use of my said wife for life; remainder to the use of all and every the child and children of our marriage, in tail, with cross remainders; remainder to such uses as my said wife shall by such deed or will as is therein mentioned appoint, and in default of such appointment, to the use of her right heirs; and by the same settlement, her portion, consisting of the sum of 1500*l.*, was agreed to be vested in the trustees therein named, upon trust, after the

solemnization of the said marriage, to pay the interest thereof to me during my life, and after my decease to my said wife for her life, and after the decease of the survivor of us upon such trusts, as to the principal money, for the benefit of the children of the said marriage as therein mentioned, and in case there should be no such child or children, or being such, all of them should die before such ages or times as are therein mentioned, upon trust, to apply the said sum of 1500*l.* as my said wife should by such deed or will as is therein mentioned appoint, and in default of such appointment, to her executors, administrators, or assigns; and my father, Richard N., thereby covenanted, that in case the then intended marriage should take effect, and the said Mary should survive me, he, his heirs, executors, or administrators, would yearly pay unto her during her life such sum of money, as, with the clear yearly produce of her said real and personal estate thereby settled or agreed to be settled, would make up the clear yearly sum of 200*l.*, and my said father thereby covenanted to pay the sum of 2000*l.* to the said trustees therein named, upon such trusts, for the benefit of the children of the said marriage as are therein mentioned: and whereas the said portion or sum of 1500*l.* was received by me, and yet continues in my hands, and there hath not, as yet, been any issue of the said marriage; and whereas my said late father, Richard N., by his last will and testament, in writing, bearing date the ——— day of ———, 17—, after confirming the said settlement, and ordering his debts to be paid out of his personal estate, devised his freehold messuages, lands, and tenements at B———, in the county of ———, to the use of a trustee therein named, for the term of 500 years, upon the trusts thereafter declared, and hereinafter in part mentioned; remainder to the use of me for life, without impeachment of waste; remainder to the use of

Limitations by way of strict settlement recited.

trustees and their heirs during my life, in trust, to preserve the contingent remainders; remainder to the use of my first and every other son successively, in tail male; remainder to the use of my daughters, as tenants in common, in tail, with cross remainders; remainder to his nephew, William N., for his life; remainder to the use of trustees and their heirs during the life of the said William N. in trust, to preserve the contingent remainders; remainder to the use of James N., son of the said William, for his life; remainder to the use of trustees and their heirs during his life, in trust, to preserve the contingent remainders; remainder to the use of the first and every other son of the said James N. successively, in tail male; remainder to the use of the male heir, who should be lawfully entitled for the time being to the ancient estate, at G. belonging to the N———'s, for the life of such male heir; remainder to the use of trustees and their heirs during the life of the said male heir, to preserve the contingent remainders; remainder to the use of the first and every other son of the said male heir successively, in tail male, reversion to the use of his (my said father's) right heirs; and he gave to his wife an annuity of 100*l.* for her life, to be paid out of his real estate, and declared that the said term of 500 years was so limited to the use of the trustees thereof as aforesaid, for securing the payment of the said annuity, and for raising all such sum and sums of money as he should have to pay in consequence of his covenant in my said marriage, and he gave his leasehold estate to trustees upon trust, to permit the person who for the time being should be in possession of his freehold estates by virtue of his will, to receive the rents and profits thereof, subject to the payment of the said 100*l.* annuity, and the sum he had engaged to pay under my said settlement; and he gave all his monies at interest and securities for the same, and the interest thereof,

Dispositions of
personalty by
his father's will
recited.

and 500*l.* stock in the ——— canal, (200*l.* whereof then stood and is yet standing in my name) and all profits and dividends belonging to the same, and also all his silver plate, household furniture, beds, bedding, pictures, prints, watches, books, live cattle, husbandry gears, to trustees upon trust, to pay out of his said monies his debts, funeral expenses, the probate of his will, and in the next place, to pay to me the sum of 500*l.* upon my succeeding to the rectory of G. by three equal payments in each year, next after my institution, for the purpose of being laid out at my discretion, in the improvement of the glebe lands, and buildings; and as to the remainder of the money, to lay out the same, with the approbation of the person who for the time being should by virtue of his will, be in the possession of his real estate, in the purchasing of freehold premises, in the county of ———, to be conveyed to the trustees, upon the same trusts as the other real estates by virtue of his will were limited to, or such of them as should be capable of taking effect: as to husbandry gear, and quick goods, they were to be sold, and the money arising therefrom to be invested in the purchase of freehold lands, within the county of ———, for the uses limited of his other estates by his said will; and as to household furniture, beds, bedding, rings, watches, plate, pictures, &c. he gave to his wife such parts thereof as he should particularize in a schedule, for her life; and as to such parts thereof as should not be so directed, and those so directed after her death, the trustees were to permit the person for the time being entitled to his real estate, to have the use thereof; and, until such purchases as aforesaid should be made, the trustees were to continue the monies at interest, or to call in and replace the same, either on mortgages, or invest the same in the public funds, and pay or permit the person lawfully in possession, for the time being, of his real estates, to receive the interest and dividends of the same; and as to the said 500*l.* canal

stock, the trustees were to permit the person or persons, who for the time being would be entitled to the premises to be purchased as aforesaid, or until purchased, the interest of the money intended to purchase the same, to receive the dividends thereof, and afterwards to transfer the principal to such person and persons, his, her, and their executors, administrators, and assigns, in whom the premises so to be purchased, (when purchased), his or their heirs or assigns, should become absolute at law, by virtue of his will. And he made me (subject and without prejudice to any of the trusts therein contained) executor of his said will: and whereas my said father departed this life in the year —, without revoking or altering his said will, leaving me, his only child and heir at law; and shortly after his decease I proved the same will, in the Prerogative Court of Canterbury. And whereas, exclusively of the specific estates, to the enjoyment whereof I am entitled for my life, under my said father's will, I remain possessed of the said sum of 500*l.* canal stock, and of the sum of 700*l.* like stock, which my said father purchased after the making of his said will; and the residue of my said late father's personal estate, has been permitted to remain in my hands; and it will appear by my accounts, as executor of my said father's will, that such residue amounts to the sum of —*l.* And whereas, the said Jane, my late mother, departed this life in the year —, having first duly made her last will and testament, whereby she gave to me all arrears which should be due in respect of her said annuity of 100*l.* at the time of her death, upon my paying to her relation Mary R—, an annuity of 10*l.* during her life; and gave the use of her watch to me for life, and at my decease, the same, and the rings, pictures, and trinkets, whereof she was possessed, she directed to go to the uses thereof directed by her said husband's will; and I having elected to take the benefit of the bequests in her said will, have paid the

Debits himself
as his father's
executor, on
account of the
residue of his
personal estate.

said annuity of 10*l.* to the said Jane R—, up to the last day of payment thereof, preceding the date of this my will. And whereas, I am desirous that as well the trust in my said marriage settlement, regarding the said portion or sum of 1500*l.* as those of my said father's will, touching his personal estates, or such and so many thereof as remain to be performed, and also the trusts in my said mother's will, touching the specific chattels therein-mentioned, should be performed and carried into execution, I therefore direct that ——— and ———, my executors, hereinafter appointed, do and shall, as soon as conveniently may be after my decease, pay the sum of 1500*l.* in satisfaction of the debt owing from me in respect of my having so received my wife's portion of that amount as aforesaid, with interest for the same, after the rate of 5*l.* for 100*l.* for a year, to the trustees or trustee for the time being, in my said marriage settlement, upon such of the trusts therein declared concerning the same respectively, as shall be then subsisting or capable of taking effect: and I further direct that my said executors do and shall, so soon as conveniently may be after my decease, transfer the said sum of 500*l.* navigation stock, unto the trustees or trustee for the time being, who shall be then entitled to receive the same under my said father's will, upon such and the same trusts therein declared concerning the same respectively, as shall be then subsisting or capable of taking effect; and also that they my said executors do and shall, so soon as conveniently may be after my decease, deliver over the specific things, to the enjoyment whereof I am entitled for my life under the said will of my mother, to the person or persons who for the time being shall be then entitled to receive the same upon such of the trusts therein contained or referred to, as shall be then subsisting or capable of being performed, and deliver over such plate, furniture, pictures, rings, watches, and books

That testator is desirous of performing the trusts of his marriage settlement, and his father's and mother's will before mentioned.

Direction to his own trustees and executors, to make good the sum of 1500*l.* which he owes to the trustees of his marriage settlement.

To transfer the 500*l.* navigation stock to the trustees of his father's will.

To transfer the specific things, which, under his mother's will, he was to enjoy for life, to the persons entitled to receive the same after him.

To pay over the sum stated in his (the testator's) account, as his father's executor, to be the balance owing from him, as such executor, in respect of the residue of his father's personal estate, to the person or persons entitled to receive the same under his father's will.

To replace some articles of his father's furniture, sold by him.

And to pay over a sum left by his father to a charity.

as my said late father died possessed of, and that have come to my hands, the books being mentioned in a catalogue made by him, and the plate being distinguished by the armorial bearings of his and my late mother's family, or one of their families; and pay over, to the person or persons entitled to receive the same under my said father's will, the said sum of ———l. (which is stated in my said account as executor to be the amount of the balance owing from me, as such, in respect of the clear residue of my said father's personal estate, to be laid out in the purchase of lands as aforesaid, or such other balance or sum of money as may be found due on the taking of such account. And whereas it will appear from my said account, as executor, that some articles of my said late father's furniture were sold by me, which produced the sum of ———l. I direct my executors to make good the same to the said trust estate, either by the delivery of furniture of mine of the like value, or by payment of that sum, to the person or persons entitled for the time being to receive the same under my said father's will. And in as much as I have in my hands, as executor as aforesaid, the sum of 26 l. for which I have taken credit in my said account as a debt due from my said late father's estate to or in trust for ——— charity, the interest whereof has been for many years past applied for the charitable purpose hereinafter mentioned, I therefore direct my executors to discharge that debt by payment of the said sum of 26 l. to such persons, to be approved by the rector, for the time being, of the parish church of G. aforesaid, as they shall think fit, upon trust to place the same out at interest on government or real securities, with liberty of transposing the same, and to pay the interest or dividends arising therefrom, to the master, for the time being, of the endowed school at G. aforesaid, for educating 11 poor boys in the said school, to be nominated from time to time by such rector, or in his absence from the said cure, by

the officiating minister, for the time being, of the said church. And I give unto my said wife an annuity or yearly sum of 10 *l.* of lawful money of Great Britain, during her natural life, in addition to her provision under my said marriage settlement and the trusts of the term of 500 years created by my said father's will, the same to be paid clear of taxes and without deductions, by equal half-yearly payments, the first payment thereof to be made at the expiration of six calendar months next after my decease. And I give to my said wife absolutely such of my household furniture^a and linen (1) as she shall select, not exceeding, in the whole, the value of ———*l.* (such value to be ascertained by the general appraisement which I desire to be made of my furniture) except locks, iron ovens, bells fixed, fixed stoves, and such other things as are or may be fixed or fastened to the mansion-house at G. wherein I now reside, my will being that such excepted articles shall go along with the said mansion-house, and be enjoyed by the person or persons for the time being entitled to the possession thereof, as heir-looms, so long as the law will permit. And I give to her my said wife the use and enjoyment of such plate as I have purchased, and whereon are engraven the armorial bearings of her or my family, or one of our families, during her life. And from and immediately after her decease I give the same to George N., second son of the said William N., if he shall be then living, absolutely, and if he shall be then dead, unto Peter N., third son of the said William N., if he shall then be living, absolutely; but if neither of them the

Additional annuity to testator's wife.

Furniture to his wife absolutely.

Except articles fixed or fastened to the house, which are to go with the house and be enjoyed as heir-looms.

The plate, whereon there are armorial bearings, to the wife for her use during her life, and after her decease, to two persons named in succession, and if neither should be living at testator's decease to go together with the personal estate.

^a See note in page 540.

(1) A bequest of the best of my linen, or of some of my best linen, is void for uncertainty; but a bequest of such of my linen as my executor shall think fit, or as J. S. (the legatee) shall chuse, is good; 2 P. Wms. 387, *Peck v. Halsey*.

His wife to sign
an inventory *.

Legacies and
mourning.

Remuneration
to executors.

Charity legacies.

For educating
four poor boys.

To a hospital.

A sum to be dis-
tributed as alms.

said George N. or Peter N. shall be then living, then the same to be considered as part of the residue of my personal estate; and my will is that an inventory shall be made of such plate, and that my said wife shall, on receiving the same, be required to sign such inventory, accompanied with an undertaking for the delivery thereof by her representatives, upon or immediately after her decease, to the person or persons who shall be entitled to the same under this my will. I give to S. P. the sum of 100*l.* and to R. S. the like sum of 100*l.* and I desire that each of them may have decent mourning at the discretion of my executors. I give to my executors the sum of 100*l.* a piece, as an acknowledgment for the trouble that they may have in the execution of this my will. I give to the said James N. the sum of 30*l.* upon trust, to place out the same on government or real securities at interest, in the name of such persons as he, his executors or administrators, shall think proper, with liberty to the trustees or trustee thereof for the time being, of transposing the same, to the intent that such trustees or trustee do apply the interest or dividends arising therefrom, for or towards the education of four poor boys, at or in the said school at G. aforesaid, to be from time to time nominated by such trustees or trustee for the time being. I give the sum of 100*l.* to the treasurer for the time being of the infirmary of ———, in the county of ———, to be applied to the charitable purposes of that institution; and I direct my executors to distribute the sum of ———*l.* among such poor persons attending divine service in the parish church of G. aforesaid, the Sunday next after my death, and in such propor-

* The effect of a direction for an inventory is held of itself to limit the enjoyment to the life only of the legatee, 13 Vez. jun. 493, Southey v. Lord Somerville.

tions as they my said executors shall think proper; and I desire that all my servants who shall be in my service at the time of my decease, may receive a whole year's wages, to be added to the sum or sums then due to them for wages (2). And as to the residue of my personal estate, not otherwise disposed of by this my will, I give the same to my said executors, upon trust, that they, or the survivor of them, or the executors or administrators of such survivor, do and shall place out the same at interest in some of the parliamentary stocks or funds of Great Britain, or on real securities in England at interest, and do and shall from time to time vary, alter, or transpose the same for other stocks or funds, or securities of the like nature, when and so often as it shall seem expedient; and do and shall, after paying and keeping down the said annuity of 10*l.* hereinbefore given to my said wife for her life, and also the said annuity which I am liable to pay to the said Mary R. during her life, in the mean time, until the capital in the respective shares thereof shall become payable or transferible as hereinafter is mentioned, invest the interest or dividends thereof, as and when the same shall amount to 100*l.* in like stocks, funds, or securities, so as to cause the same to accumulate in the nature of compound interest; and do and shall pay or transfer one-third part of all such stocks, funds, and securities, but subject and without prejudice to the payment of the said annuities, unto the said George N. as and when he shall attain the age of 21 years; one other third part thereof unto the said Peter N. as and when he shall attain the age of 21 years; and the remaining third part unto Maria N. daughter of the said William N. as and when she

The residue of the personal estate to be placed out at interest, with power to trustees to vary and transpose securities.

And after keeping down the annuities,

To reinvest the dividends for the purpose of accumulation until the principal shall be payable, as after mentioned. One third to be paid to —, one other third to —, and the remaining third to —, at 21, with chance of survivorship.

(2) Under a general bequest to servants a coachman, provided with a carriage and horses let by the job, is not entitled, 12 Vez. jun. 114, *Chilcot v. Bromley*.

And if neither
of the three
should live to
become entitled,
to be transferred
to —.

Devise of his
own messuages
and farms not
under settle-
ment.

shall attain her age of 21 years; in case any one or more of them the said George N. Peter N. and Maria N. shall die without having attained the said age, then the share or shares of him or them so dying, of and in the said stocks, funds, or securities, shall go and be paid or transferred, subject and without prejudice as aforesaid, to the survivors or survivor, or others or other of them, as and when their respective original shares shall respectively become payable or transferible as aforesaid; and in case any other of them shall die without having attained the said age, then all and every the accruing share or shares shall be subject and liable to the like contingency of accruer or survivorship as is hereinbefore declared, touching his, her, or their respective original share or shares; and in case all of them the said George N. Peter N. and Maria N. shall die without any of them having attained the age of 21 years, then my will is that the whole of such stocks, funds, or securities shall be transferred, but subject and without prejudice as aforesaid, to ———. And I appoint the said ——— executors of this my last will and testament. And as to my messuage, farm, and lands, situate at or near W. aforesaid, I give the same unto S. P. and R. S. their heirs and assigns, for ever; and as to my messuages, farm, and lands, situate in or near to the said settled estate of my family at G. aforesaid, which I purchased of William S. for the sum of 1900l. my messuage, farm, and lands situate at or near to the said estate at B. aforesaid, which I purchased of James P., my lands in ———, contiguous to the said estate at B., and intermixed therewith, which I purchased of John G., my lands in ———, lying also contiguous to the said estate at B., which I purchased of Hugh H., which several premises so purchased by me are partly freehold and partly leasehold; and also as to, for, and concerning my messuage, farm, and lands situate at B. in the said county, and all the rest of

my freehold and leasehold estates whereof I have power to dispose in possession, reversion, remainder, or expectancy, and not hereinbefore disposed (3) of, I give the same unto and to the use of the said To trustees.
_____ and _____, their heirs, executors, administrators, and assigns, upon the trusts hereinafter expressed and declared of and concerning the same, that is to say, upon trust, that they and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, Upon trust to sell or dispose thereof.
as soon after my decease as they or he shall think fit, make sale and dispose of all and every my said freehold and leasehold estates, so devised to them as aforesaid, either together or in parcels, by public auction or private contract, as to them or him shall seem meet, for the most money that can be reasonably had or gotten for the same; and I do hereby Their receipts to be discharges.
declare that the receipt and receipts of the said, &c. and the survivor of them, the heirs, executors, administrators, or assigns of such survivor, under their or his hands or hand respectively, shall from time to time be a good and effectual discharge, or good and effectual discharges, to the purchaser or purchasers of the same freehold and leasehold estate, or any part thereof, and his, her, or their heirs, executors, administrators, and assigns, for his, her, or their purchase-money, or so much thereof as in such receipt or receipts shall be expressed to be received, and that such purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall not be answerable or accountable for any loss, mis-

(3) If a testator, in terms, excepts out of his residuary devise what he has before disposed of, such exception takes out of the residuary devise only the interest in the things given, not the things themselves; therefore if a life-estate only in any subject has before been passed, the residuary devise comprehends and carries the remaining interest; see 3 Atk. 286.

And as to the money produced by the sales;

In the first place to be applied in aid of the personal estate, in paying debts, charges and legacies;

And subject to such application in the first place, to be considered as personal, and to go according to the disposition of the residue of his personal estate.

Proviso, that if his late father's trustees should be willing to accept a conveyance of his estate at B——, at the sum at which the same was purchased by testator, it should be lawful for testator's trustees to make such conveyance, taking a discharge for so much of the balance of his father's residuary estate in his hands as the purchase money for such estate should amount to.

application, or non-application of such purchase-money so expressed to be received; and as to the money arising from such sale or sales as aforesaid, (as to which I direct a separate account to be kept), my will is, that the same shall be in the first place applied in making good the deficiency, if any shall then be, of my personal estate, not specifically bequeathed, in paying my debts, funeral, and testamentary charges and legacies, (save those for charitable purposes) and that the residue of such monies, or the whole thereof, if there shall be no such deficiency, shall be paid to such person or persons, and be applied for such intents and purposes, as the residue of my personal estate is hereinbefore directed to be paid and applied; and as to the rents, issues, and profits of the said estates, until sale thereof, I will that the same shall be paid and applied in such manner as the interest of the money arising by sale thereof would be payable or applicable under this my will, in case such sale had taken place. Provided always, and it is my will, that in case the trustees or trustee for the time being of the residue of my said father's personal estate, shall be willing to accept a conveyance and assignment of my freehold and leasehold estates, in B——, aforesaid, or any of them, or any part thereof, at the above-mentioned sum or sums of money, for which I purchased the same, then and in such case it shall be lawful for the trustees or trustee for the time being, under this my will, to make such conveyance and assignment accordingly, on obtaining a sufficient discharge for so much of the said balance on account of the said residuary estate in my hands, as the consideration money of the estate or estates comprized in such conveyance or assignment shall amount to. Provided always, and my will is, that it shall and may be lawful to and for the said, &c. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, from time to time, by in-

denture or indentures under their or his hands and seals, or hand and seal, to demise or lease the said freehold and leasehold hereditaments, and premises, so vested in them as aforesaid, or such of them as shall be remaining unsold or undisposed of, during the minority of the said I. P. and R. S., or either of them, unto any person or persons, for any term or number of years not exceeding 21 years, in possession, not in reversion, or by way of future interest, so as upon every such lease there be reserved and made payable, during the continuance thereof respectively, the best and most improved yearly rent or rents that can be reasonably had for the same, to be incident to the reversion of the premises so to be demised, without taking any sum or sums of money, or other thing by way of fine or premium for the making of any such lease, and so as none of such lessees shall be made dispunishable for waste, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents, to be thereby respectively reserved, and that such lessees seal and deliver counterparts of such lease and leases. Provided, and my will further is, [proviso for substituting new trustees with safety, and indemnity clauses.]

Leasing power
to trustees.

Part of a Will directing a Settlement, with Limitations in a strict Form for preserving the Estate in the Family of the Testator.

I GIVE and devise all and singular my freehold manors, messuages, lands, tenements, and hereditaments,

Testator devises his real estates to the use of two sets of trustees successively, for two several terms of 99 and 200 years.

wheresoever and whatsoever, not hereinbefore devised, to hold the same unto the said J. W. and Sir R. J. B., their heirs and assigns, to the uses following, that is to say, as to, for and concerning all such of the same hereditaments and premises, as are situate in the parish, township, or precinct of N——, in the county of N——, with their appurtenances, to the use of the said Sir G. C., R. M., and J. D., their executors, and administrators, for, and during, and unto the full end and term of 99 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisos and declarations hereinafter declared or expressed with respect thereto: and as to, for, and concerning all such of the same hereditaments and premises as are situate in the parishes, townships, or precincts of F. H. and S. and the parishes or townships contiguous and next adjoining thereto, with the appurtenances, except the manor or lordship of F——, and the advowson of the rectory of F——, to the use of the said Sir G. C., R. M., and J. D., J. C. J.; and J. F., their executors, and administrators, for and during and unto the full end and term of 200 years, to commence and be computed from the time of my decease, without impeachment of waste, upon the several trusts, and to and for the several intents and purposes, and with, under, and subject to the several powers, provisos, restrictions, and declarations hereinafter expressed with respect thereto; and as to, for, and concerning, as well all and singular the said hereditaments, and premises comprized in the said several terms of 99 years, and 200 years respectively, from and after the end, expiration, or other sooner determination of the said terms respectively, and in the meantime subject thereto respectively, as also all and singular other the hereditaments lastly hereinbefore by me devised, from and immediately after

my decease, to the uses of the said J. W. J., and Sir R. J. B., their heirs, and assigns for ever upon the trusts, nevertheless hereinafter mentioned, that is to say, upon trust; and I do hereby direct that they the said J. W., Sir R. J. B., or the survivor of them, or the heirs of such survivor, shall with all convenient speed after my decease, convey and assure all and singular the said manors, messuages, farms, lands, tenements, and hereditaments, subject as to such of the said hereditaments as are comprized in the said several terms of 99 years, and 200 years respectively, to the same terms respectively, and the trusts thereof, to and for the uses, intents, and purposes, upon the trusts, and with, under, and subject to the powers, provisos, conditions, restrictions, and limitations hereinafter expressed concerning the same, that is to say, to the use of my said son W. A., and his assigns, for and during the term of his natural life (4), without impeachment of waste, so far as is con-

And after the determination of the terms, to trustees and their heirs to convey in strict settlement to his son and his issue.

(4) Where the object of the testator is to preserve the devised estates as long as possible in his family, he may devise the fee to trustees and their heirs to the following uses, viz. to the use of his eldest son, for the term of 99 years, to be computed from the day of his, the testator's decease, and fully to be complete and ended, if his said son shall so long live, and from and immediately after the determination of the said term, and in the mean time subject thereto, to the use of the trustees and their heirs, during the life of the said son in trust, in the usual form, to preserve the contingent remainders, and from and after the decease of the said son, to the use of the first and other sons of that son in tail male, to be followed with like limitations successively, in favour of the younger sons of the testator, and their first other sons respectively, remainder to testator's eldest daughter, for a similar term, if she should so long live, remainder to trustees to preserve contingent uses, and so on, with like limitations successively in favour of the testator's younger daughters, with remainder to their first and other sons respectively, in tail male, in the same manner with successive remainders, if testator please, to daughters of sons, and then to daughters of daughters, as tenants in common in tail, with cross remainders.

The consequence of thus giving to the children of the testator terms of years determinable with their lives, instead of estates of free-

sistent with the trusts of the same several term of 99 years, and 200 years respectively, while the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said W. A., to the use of trustees in such settlement, to be named, and their heirs, during the life of the said W. A., in trust by the usual ways and means to support and preserve the contingent uses and estates thereby limited, but nevertheless to permit and suffer the said W. A., and his assignees during his life to receive and take the rents, issues, and profits thereof, for his and their own benefit; and from and after the decease of the said W. A., to the use of the 1st, 2nd, 3d, 4th, and all and every other son and sons of the body of the said W. A., lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another, as they respectively shall be in seniority of age and priority of birth, and the several respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that every elder of such sons, and the heirs male of his body issuing, shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing, and for default of such issue, to the use of my said younger son Edward, for and during the term of his natural life, without impeachment of waste, so far as is consistent with the trusts of the same several terms of 99 years, and 200 years respectively, whilst the same shall be respectively subsisting, and from and after the determination of that estate, by forfeiture or otherwise, in the life-time of my said son Edward,

hold, will be, that they will not be able with the concurrence of the tenant in tail in remainder, unless the trustees will join in making a tenant to the præcipe, to suffer a recovery so as to defeat the remainders after such tenant in tail: the tenant in tail, can in such a case, only bar his own issue by a fine.

to the use of such trustees in such settlement to be named, and their heirs, during the life of my said son Edward, in trust, by the usual ways and means to preserve and support the contingent uses and estates thereby to be limited, but nevertheless to permit and suffer my said son Edward, and his assigns, during his life, to receive and take the rents, issues, and profits thereof, for his and their own use and benefit, and from and after the decease of my said son Edward, to the use of all and every other the 1st, 2d, 3d, and 4th son and sons of the body of my said son Edward, lawfully begotten, severally, successively and respectively, and in remainder, one after another as they respectively shall be in priority of birth and seniority of age, and the several and respective heirs male of the body and respective bodies of such son and sons, lawfully issuing, so as that the elder of such sons, and the heirs male of his body issuing, shall always be preferred to and take before the younger of such sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of all and every other the son and sons of my body, lawfully begotten, or to be begotten, severally, successively, and respectively, and in remainder, one after another as they respectively shall be in seniority of age, and priority of birth, and the heirs male of the body and respective bodies of such son and sons lawfully issuing, so as that the elder of such sons, and the heirs male of his body shall be always preferred to and take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue, to the use of trustees and their heirs, during the lives of my said daughter L. and C., and the life of the survivor of them, in trust to pay the rents, issues, and profits thereof to such person or persons respectively as they my said daughters respectively, during their joint lives, by any writing or writings under their respective hands, shall from time to time as the same

For default of issue of sons, to trustees during the lives of his two daughters, and the survivor of them, for their separate use respectively, with limitations to their respective issue in tail, but

such limitations of the inheritance not to take place till both the daughters shall be dead, to prevent alienation till that event, and then the distinct moieties to go in succession to the sons of testator's said daughters in tail male, and for default of such issue respectively, then to the first and other sons of the other daughter reciprocally.

respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have a power of disposing of more than a moiety each of the said rents, issues, and profits, and for want of such direction or appointment, into the proper hands of them respectively in moieties, whilst both of them shall be living, for their respective, sole, and separate use, exclusively and independently of any husband or husbands, and not in anywise to be subject to the controul, debts, or engagements of their respective husbands; and from and immediately after the decease of either of my said daughters who shall first happen to die, then in case such daughter so dying shall leave any child or children, her surviving, in trust during the natural life of the survivor of my said daughters, to pay and apply one moiety or equal half part of the rents, issues, and profits of the said premises unto, between, or amongst, or for the benefit and advantage of such child or children, in equal shares and proportions, if more than one, and if there shall be only one such child, then for the benefit and advantage of such one child; and to pay and apply the other moiety of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time as the same shall become due or payable, but not by way of anticipation, direct or appoint, and for want of such direction or appointment, into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in anywise subject to the controul, debts, or engagements of any husband; but in case such daughter so first dying as aforesaid shall not leave any child or children, her surviving, or leaving any such, all of them shall happen to die during the life of such surviving daughter, then upon trust, from and immediately after the decease or such failure of children

of such daughter so first dying as aforesaid, as the case may happen, in trust, to pay and apply the whole of the said rents, issues, and profits to such person or persons as such surviving daughter, by any writing or writings under her hand, shall from time to time, during her life, as the same shall become due or payable, but not by way of anticipation direct or appoint, and for want of such direction or appointment into the proper hands of such surviving daughter, for her sole and separate use exclusively and independently of any husband, and not to be in anywise subject to the controul, debts, or engagements of any husband; and my will is that the respective receipts in writing of my said daughters, and the receipt of the survivor, notwithstanding any coverture, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues, and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues, and profits therein mentioned to be received; and upon further trust, during the lives of my said daughters, and the life of the survivor of them, to preserve the contingent uses and estates, to be limited as hereinafter mentioned; and from and after the decease of the survivor of them my said daughters, as to one moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter L. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male; and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter C. successively, according to their respective seniorities in tail male, and for default of such issue, to the use of the first and other sons of my said daughter L.

And after the decease of both daughters and failure of issue of both their bodies, then as to the entirety of the premises, to the daughters of testator's eldest son as tenants in common in tail, with cross remainders; and for default of such issue to the daughters of his second son in like manner.

And for default of such issue then as to one moiety to the use of the daughters of testator's eldest daughter as tenant in common in tail, with cross remainders.

And in default of such issue to the daughters of his youngest daughter, in like manner.

And as to the other moiety to the use of the daughters of the youngest daughter, in like manner.

successively, according to their respective seniorities in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of all and every the daughter and daughters of my said son W. A. if more than one as tenants in common in tail, with cross remainders in tail, between or among them; and if all his daughters but one shall die without issue, or he shall have but one daughter, to the use of such one or only daughter in tail; and for default of such issue, to the use of all and every the daughters and daughter of my said son Edward, if more than one, as tenants in common in tail, with cross remainders in tail, between and among them; and if all his daughters but one shall die without issue; or he shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, then as to one undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughter and daughters of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, to the use of all and every the daughter and daughters of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of all and every the daughters and daughter of my said daughter C. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall

die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and for default of such issue, to the use of all and every the daughters and daughter of my said daughter L. if more than one, as tenants in common in tail, with cross remainders in tail, between or among them; and if all her daughters but one shall die without issue, or she shall have but one daughter, to the use of such one or only daughter in tail: and from and after the decease of both of my said daughters, and such failure of issue of both their bodies as aforesaid, then as to the entirety of the same hereditaments, to the use of my own right heirs. Provided always, and I do hereby declare my will and mind to be, that in the settlement so to be made as aforesaid shall be contained a proviso, that all and every the person and persons who, by virtue of the limitations to be therein contained, or of this proviso, shall become entitled to the possession, or to the rents, issues, and profits of the manors and other hereditaments in such settlement to be comprized, and who shall not then be called by the name or use the arms of H. except as hereinafter excepted or otherwise provided, do and shall within the space of one year next after they respectively shall become entitled to the possession, or to the rents and profits thereof: and also that all and every the person or persons, whom the said L. or any issue female of my said sons or daughters, respectively

And in default of such issue to the daughters of the eldest daughter, in like manner.

And after the decease of both daughters, and failure of such last-mentioned issue of both their bodies, to the use of testator's own right heirs.

Clause binding the testator's descendants and possessors of his property to take the name and use the arms of his family*.

* It seems pretty well settled that this is not a condition precedent to the vesting, and therefore a tenant in tail may suffer a recovery without troubling himself to take the name, if he objects to it. Upon this question being put to the late Mr. Fearne however, though he thought it not absolutely necessary, yet he said he would advise it to be done on the party's coming of age, before suffering the recovery, and the recovery to be suffered in the name directed to be assumed, to prevent all question on the point. See the case of *Gulliver v. Ashby*, 4 Burr. 1929, 1 Blackst. 607.

shall marry, shall and do, if the said L. or such other issue female respectively as aforesaid, shall at the time of such her or their marriage or respective marriages be so entitled as aforesaid, then within one year next after the solemnization of the said marriage or marriages respectively; and if the said L. or such other issue female respectively as aforesaid, shall not be entitled at the time of such her or their marriage or respective marriages, but shall afterwards, during her or their marriage or respective marriages, become so entitled as aforesaid, then within the space of one year next after she or they shall severally become entitled as aforesaid, take upon himself, herself, and themselves, and use in all deeds and writings whereto or wherein he, she, or they shall be a party or parties, and upon all other occasions, the surname of H. only, and no other surname: and also shall and do quarter the arms of H. with his, her, or their own family arms; and shall and do, within the space of one year, apply for and endeavour to obtain an Act of Parliament, or proper Licence from the Crown, or take such other means as may be requisite and proper to enable and authorize him, her, or them respectively to take, use, and bear the surname and arms of H.; and that in case any such person or persons shall refuse or neglect, or discontinue, to take and use such surname and arms, and to take such proper steps and means as may be requisite to enable and authorize him, her, or them so to do, within the space of one year as aforesaid, then from and after the expiration of the said space of one year, the use or estate, or uses or estates, so to be limited to him, her, or them respectively, so neglecting or refusing, shall cease, determine, and become utterly void, and that all the said manors and other hereditaments, hereinbefore directed to be conveyed and settled as aforesaid, shall in such case immediately thereupon go to the person or persons next in remainder, under

the limitations in such settlement to be contained, in the same manner as if such person or persons, so neglecting or refusing, being tenant or tenants for life, were dead, or being tenant or tenants in tail male, or in tail, were dead without issue inheritable under the estate tail, or estates tail, then vested in possession or in remainder in the person or persons so refusing or neglecting: provided always, and I do hereby expressly declare my will and mind to be, that the clause hereinbefore contained for compelling the persons hereinbefore mentioned to use the name and arms of H. shall not extend to any person or persons, who shall, under any will or other instrument whatsoever, made prior to the 1st day of January, —, be under any previous obligation of using any other family name, or bearing any other family arms. And I do hereby declare my will to be, that in such settlement shall be contained a power to enable the person or persons, who for the time being shall by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore directed to be conveyed and settled as aforesaid, for an estate of freehold, to grant, demise, limit, or appoint all and singular the said hereditaments, or any of them, or any part thereof, for any term or number of years not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions, so nevertheless that no such lease of all or any part of the hereditaments, comprized in the said term of 200 years, be made to commence prior to the 29th day of September, which will be in the year of our Lord——. And I do hereby also direct that in such settlement so to be made as aforesaid, there be contained a power enabling the said Sir G. C., R. M., J. D., J. C. J., and J. F. and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, to demise or

Settlement to contain a power of leasing.

Also a power to enable the trustees to sell or exchange.

lease all and singular the hereditaments comprised in the said term of 200 years, or any of them, or any part or parts thereof, for any term or number of years in possession, determinable on or before the said 29th day of September, which will be in the said year of our Lord, at the most improved rents, without taking any fine, and under the same restrictions; and also a power to enable the said Sir G. C. R. M. J. D. J. C. J. and J. F. and the survivors and survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprized in the settlement hereby directed to be made as aforesaid, for an estate of freehold either in possession or in remainder immediately expectant upon the said several terms of 99 years and 200 years, respectively, signified by some writing under the hand and seal or hands and seals of such person or persons, attested by two or more credible witnesses, to make sale of, or to convey in exchange for or in lieu of other hereditaments, all or any of the hereditaments to be comprized in the settlement so to be made as aforesaid, the fee simple and inheritance thereof, as well as for the said terms of 99 years and 200 years respectively, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said Sir G. C. R. M. J. D. J. C. J. J. F. or the survivors or survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales, in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands to be

And to purchase, with the money arising from such sale, other lands, and to settle the newly

comprized in such settlements as aforesaid, or any of them, or so to be purchased or taken in exchange in pursuance of this my will, and to settle the lands so to be purchased or so to be received in exchange as aforesaid, to such uses as the hereditaments which shall be so sold or conveyed in exchange stood settled and limited respectively immediately before such sale or exchange, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. * Provided always, and I do hereby declare my will to be, that no manors, messuages, lands, tenements, or hereditaments, situate, lying, and being, in the parishes of ———— and ————, respectively, or any of them, shall be sold, aliened, or disposed of, except in exchange for, or in lieu of, hereditaments in the parishes of A. and B. in the said county of N. respectively, or one of them, and two pieces of ozier ground or meadow, lying in the last-mentioned parishes, or one of them, or partly there, and partly in some other parish or parishes abutting east on a brook or rivulet that runs

purchased lands, or such as are taken in exchange to like uses *.

Limitations restricting the exercise of the last-mentioned power as to certain specific objects.

* Where a will directing money to be laid out in land, points to a particular estate, if that fails it may be laid out in other lands, the particular direction being only a mode of executing the primary intention to purchase lands, 10 Vez. Jun. 618. This has been decidedly holden by the present Lord Chancellor, though Lord Thurlow used to differ with Lord Roslyn on this question, the latter Lord being of the opinion to which Lord Eldon has since added the weight of his authority.

Where the estate directed to be purchased cannot be had, other lands may be bought.

Whether money directed to be laid out in land in a particular place, shall, if land cannot be procured there, be laid out elsewhere, has been left undecided by the present Chancellor. Lord Roslyn was of opinion it might, Lord Thurlow that it could not, see 10 Vez. Jun. 610. But as Lord Eldon held the affirmative on the other question when it came before him a short time afterwards, though it would be presumptuous to form any inference, yet a conjecture may be allowed as to the probable result, if his Lordship were now called upon to settle the point where the place and not the estate was particularized. See 3 Atk. 414. *Maynwaring v. Maynwaring*, 2 Atk. 458. *Oldham v. Hughes*.

Where the place and not the estate is specified.

Other clauses to be inserted in the settlement as counsel shall advise, but to be conformable to the spirit of this will.

Trust of the term of 99 years, to raise an annuity for the person named.

through the commons of ——— and ———, and is there the boundary of the parish of G. against the said parishes of A. and B. And further, that no sale, alienation, or disposition as last mentioned shall be made of the alternate right of presentation to the rectory of K except for the actual exchange of or for the alternate right of presentation to the rectory of A. in the said county of N. upon such terms as the said Sir G. C. R. M. J. D. J. C. J. and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge proper. And my will is, and I do hereby declare, that there shall likewise be inserted in the said settlement, all such further and other additional clauses, declarations, agreements, powers, and provisos, as the counsel of the said J. W. and Sir R. J. B. or the survivor of them, or the executor or administrator of such survivor shall advise to be proper or expedient, but conformable to the general spirit and interest of this my will. And I do hereby declare that the said term of 99 years hereinbefore limited in use to them the said Sir G. C. R. M. and J. D. of and in the hereditaments and premises in N. as aforesaid, is so limited to them, and that they the said Sir G. C. R. M. and J. D. and the survivors or survivor of them, and the executors and administrators of such survivor shall stand and be possessed of, and interested in the same, and the hereditaments therein comprised, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos hereinafter declared or expressed, of and concerning the same, that is to say, in trust by mortgage, of the hereditaments comprised in the same term, or a competent part, or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by any of the said ways and means, or by any other such ways and means as to the said Sir G. C. R. M. and J. D., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet,

to levy and raise, by even and equal quatterly payments or portions, one annuity, or clear yearly sum of 400*l.* of lawful money of Great Britain, during the life of my said brother R. H. and for one year after his decease, free from all deductions or abatements whatsoever; and also all such sum and sums of money as shall be sufficient to pay and reimburse to the said trustees respectively, their respective executors and administrators; all costs, charges, losses, damages, and expences, which they respectively shall or may sustain, expend, or be put unto, in, or about the levying or raising the said annuity or yearly sum of 400*l.* or any part thereof, or in any wise relating thereto; and from time to time, by and out of the said annuity or yearly sum of 400*l.* as the same shall be received, in the first place to make such allowances to my said brother R. H. as are now usually made to him; and to defray and pay the other charges and expences now usually incurred for his maintenance; together with such further additional sums as the said Sir G. C. R. M. and J. D. or the survivors or survivor of them, or the executors or administrators of such survivor may deem requisite or proper for his additional comfort or convenience; and also all expences attending the funeral of my said brother; and all just debts as may be owing by him or on his account at the time of his death, and from time to time to pay the residue of the said annuity or yearly sum of 400*l.* after answering all and every the purposes aforesaid, to the person or persons who shall for the time being be intitled to an immediate estate of freehold, of and in the hereditaments comprised in the said term of 99 years, expectant on the same term, or to the receipt of the rents, issues, and profits thereof, for his, her, or their own absolute use and benefit. Provided always, and I do hereby declare my will to be, that from and after the trusts and purposes by this my will declared or expressed,

Proviso for ceas-
er of the term
when the trusts
shall be fulfilled.

Trusts of the
term of 2000
years to aid the
personal estate,
if insufficient,
in paying the
debts, charges,
and legacies,
and to defray
the expence
of keeping
the premises
comprized in the
term in repair;
to pay the
expences of
renewals of
renewable leases,
and fines upon
admittances to
copyholds; to pay
the expence of
purchasing cot-
tages and com-
mon rights, and
of inclosure;
a salary to the
receiver of the
rents of the
estates com-
prized within
the first term;
to pay additional
portions, and to
satisfy such
securities as
shall have been
given for the
same, and to
raise a sum by
way of jointure
for such woman
as testator's
younger son may
marry; and to lay
out the residue

of or concerning the said term of 99 years, shall be fully performed and satisfied, or shall become unnecessary or incapable of being performed, or be otherwise discharged, the said term of 99 years, of and in the said hereditaments comprized therein, or so much thereof as shall not have been mortgaged for the purposes aforesaid, shall cease, determine and be absolutely void to all intents and purposes whatsoever. And I do hereby declare that the said term of 2000* years hereinbefore limited in use to them, the said Sir G. C., C. M., J. D., J. C. J. and J. F., their executors and administrators as aforesaid, is so limited to them, and that they the said Sir G. C., R. M., J. D., J. C. J., and J. F., their executors and administrators, shall stand possessed of, and interested therein, upon the several trusts and to and for the several intents and purposes, and with, under, and subject to the several powers, provisos, restrictions and declarations following, that is to say, upon trust, that they the said Sir G. C., R. M., J. D., J. C. J., and J. F., and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do by mortgage or sale of the hereditaments and real estate comprized in the said term or a competent part or competent parts thereof, from time to time, and by and out of the rents, issues, and profits thereof, or by cutting down timber or other trees, so nevertheless that no timber or other trees be cut down without the consent in writing of the person or persons, for the time being, intituled to the next immediate estate of freehold of and in the said hereditaments comprized in the said term of 2000 years expectant on the said term, or by all or any of the said ways and means or by any other such ways and means as to the said Sir G. C., R. M., J. D., J. C. J., and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall seem meet, levy and raise such sum and sums of money as shall be

* By mistake called 200 years in the former part of the will.

sufficient to pay, and shall and do accordingly pay, after my personal estate not hereby specifically bequeathed shall be applied so far as the same shall extend, my funeral expences, and the expences of proving this my will, and the pecuniary legacies, (except the additional portions) and the annual sums for my younger children, hereinafter directed to be raised or paid and given, and all my bond, simple contract, and other debts, and the interest of such debts as carry interest, as the same shall become due, and all arrears thereof, and all the expences of keeping the said several premises comprized in the said term of 2000 years, in good order and repair, and the taxes, assessments, and out-goings in respect thereof payable by the landlord, and the expences of renewing from time to time the leases of my several leasehold estates hereinafter bequeathed until the whole beneficial interests therein respectively shall vest in any person or persons absolutely, (so nevertheless that no renewal shall be taken) of the lease of the manors of S——, and the lands and tenements hereinafter mentioned to be holden by lease under the crown, without the consent of such person or persons as hereinafter mentioned) and also the expences of all admittances to copyhold estates under this my will, and the expences attending the purchase of any cottages, with the appurtenances and commonable rights within the parish of F. aforesaid, which the said Sir G. C., R. M., J. D., J. C. J. and J. F., or the survivors or survivor of them, or the executors or administrators of such survivor shall judge it expedient to purchase, so as the consideration-money for the whole of such purchases do not exceed the sum of ———l. and so as the hereditaments so to be purchased be settled and assured to such uses, and upon, to, and for such trusts, intents and purposes, and with, under, and subject to such powers, provisos, limitations, and declarations, which at the respective times of such purchase or purchases being made, shall be

in the funds, to accumulate for 20 years of the term as a fund subject in the first place to satisfying the aforesaid trusts, and then to answer the aftermentioned objects.

subsisting or capable of taking effect of the hereditaments and premises comprized in the said term of 2000 years, under or by virtue of this my will, or of the settlement hereinbefore directed to be made as aforesaid, and also all expences attending any inclosure of the common of F. and the planting thereof or otherwise improving the same; and the expences of my trustees and executors in the execution of this my will and the trusts and powers herein contained, and a proper and sufficient salary or allowance to the person or persons who for the time being shall be employed in managing my estates comprized in the said term of 2000 years, and receiving the rents and profits thereof, and keeping books and accounts for my trustees for the time being, of all matters relating to this my will, and the trusts herein contained or expressed: and in the next place levy and raise, and pay such additional portions for my daughter L. and my said son E. as are hereinafter mentioned, when and as the same respectively shall become due and payable, and be called in and demanded, or discharge and satisfy such securities as may have been given for the same, and all mortgages which shall have been made for raising the same, and also such annual sum for or in the nature of a jointure for any woman with whom my said son E. shall happen to marry, as hereinafter is mentioned, and such sum in gross for the benefit of the younger sons and daughters of my said son E. as hereinafter is mentioned, and all such sum and sums of money as shall be sufficient to answer all and every the payments hereinafter directed to be made out of the money to arise or be received under or by virtue of the trusts of the said term of 2000 years; and shall and do accumulate from time to time for and during and unto the full end and term of 20 years, to commence and be computed from the time of my decease, so much of the rents, issues, and profits of the said hereditaments and premises comprized

prized in the said term of 2000 years, as shall not be from time to time applied for some or one of the purposes aforesaid, according to the direction aforesaid, and lay out and invest the same from time to time in the names or name of them my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in some of the public funds, and from time to time accumulate the dividends, interests, and proceed of such funds, or so much thereof as shall not be applied for some or one of the purposes aforesaid, and lay out and invest the same in like manner, and so in like manner to accumulate the dividends, interests, and proceed of such other funds, or so much thereof as shall not be applied as aforesaid, to the intent that in this manner a fund may be established for answering the purposes aforesaid, and also the purposes hereinafter mentioned, out of which fund I direct the same or such of them as shall from time to time remain unsatisfied and be capable of being carried into effect, to be answered and carried into effect. And my will is and I do hereby direct and appoint that by and out of the said fund so to be established as aforesaid but not otherwise, after the several purposes aforesaid, or such of them as shall be capable of being carried into effect shall be satisfied, the trustees or trustee for the time being of the said term of 2000 years, hereby limited or created, shall pay off and discharge all mortgages, securities, and charges which shall have been made of or upon any of my estates in pursuance or by virtue of this my will, besides such mortgages as are hereinbefore directed to be paid, and in the next place shall pay off and discharge so far as the said fund shall extend, such mortgage or mortgages and securities as may then have been made in pursuance or by virtue of or under the said indenture of the — day of ———, or any part, or parts thereof, for the purposes of raising all or any of the portions thereby directed to be raised, or any

Trustees out of the said fund to discharge mortgages upon any of the testator's estates.

Testator gives his leaseholds not before bequeathed to trustees, in the first place, out of the rents and profits, to pay the rents, the expences of performing the covenants, and of renewals, and subject thereto to stand possessed thereof upon trusts to correspond as nearly as may be with the uses, trusts, &c. before declared and limited of and concerning the freehold property, (except the said terms of 99 and 2000 years) but so as not to be considered as

of them, or any part or parts of them, or of any of them; and in case the said last-mentioned portions or any part or parts thereof respectively, shall not have been so secured, then in trust to pay off and discharge such of the said portions or such part or parts thereof as shall not have been so secured. And I give and bequeath all my leasehold lands and tenements not hereinbefore bequeathed as aforesaid, nor included in any settlement made by me previous to the making of this my will, unto the said Sir G. C., R. M. J. D., J. C. J., and J. F., their executors and administrators, for all my term and terms, estate and interest therein respectively, in trust in the first place out of the rents and profits thereof, to pay the rents reserved and to be reserved by the respective leases under which the same are or shall be holden, and to perform and pay the expences of performing the covenants and agreements in such leases respectively contained on the lessees or tenants parts, and to pay the taxes payable by the landlord in respect thereof, and to renew and pay the expences of renewing such leases from time to time, at the accustomed times of renewal, and subject thereto, to stand and be possessed and interested of and in the same respectively, upon such trusts *, and to and for such intents and pur-

Of the effect of the clause directing leaseholds to be settled as far as the law will allow, upon trusts correspondent to the uses of the freehold.

* By a limitation of leaseholds or mere personal chattels in strict settlement where the personal estate is either included in the same limitation as the freehold, or limited with reference to such limitations of the freeholds, the first tenant in tail that comes into esse, becomes absolutely entitled to the personal property, subject to the preceding particular estates therein, and this of course frequently produces a separation between the real and personal estate. See *Gregory v. Pelham*, 5 Bro. P. C. 435, and the *Duke of Bridgwater v. Egerton*, 2 Vez. 122, and *Duke of Marlborough v. Spencer*, 5 Bro. P. C. 592. But this vesting may be postponed by specific limitations to a more distant period, and the estate made to accompany still further the freehold estates. The settlor may suspend the absolute vesting of the leasehold estates to any period not exceeding 21 years, after a life or lives in being. In reference to these modes of continuing the personal estate in the channel of the real estate, wills and

poses, and with, under, and subject to such powers, provisos, conditions, restrictions, limitations, and

vested in equity
in any person
who would be

settlements frequently vest the leasehold property in trustees, directing them to settle them according to the limitations of the freehold *as far as the law will allow*, or in terms of similar import. Lord Hardwicke treated these words as affording a ground for a Court of Equity, to model the limitations accordingly; for he thought that this clause was to be considered as executory and directory, and that it was for that Court to direct such conveyance as would make the interests in both species of estates, correspond as far as by law was practicable, or in other words, as far as the settler or testator could himself have done; and it was plain he might have limited them to A. for life, remainder to his first son, and the heirs male of his body, and if such first son died before the age of 21, and without issue male, remainder over to his second son; he might have made the same limitations over to all the other sons, and in default of such issue, he might have limited the remainder over; and in case no son had lived to attain the age of 21, the remainder would have been clearly good. It was said by Lord Hardwicke, that that was the common and known way of conveyancing in settling chattels, and that where things were directed to go as heir-looms with an estate, or, in case of a marriage settlement, or the like, so far as they could by law or equity, it was very proper it should be left to the court to settle the conveyance. See *Gower v. Grosvenor*, Barnardiston's Rep. in Ch. 54, and *Trafford v. Trafford*, 3 Atk. 347. But other cases have held that these words, "as far as the law will allow," do not necessarily import a desire that the chattels should be kept in the channel of succession as long as the ingenuity of conveyancers might contrive; but that they must be understood as being meant only to direct that estates may be taken in the personal property as nearly correspondent as the law allows, having respect to their different natures. And this was Lord Thurlow's opinion, see *Vaughan v. Burslem*, 3 Bro. C. C. 101. who there held that when the first son came into esse, he was absolutely entitled under such a directory clause; see *Foley v. Barnell*, 1 Bro. C. C. 274. It appears that Lord Eldon had considered the question as settled by the two cases of *Foley v. Barnell*, and *Vaughan v. Burslem*, for in the *Countess of Lincoln v. the Duke of Newcastle*, 12 Vez. Jun. 218, he said that if he had decided that cause originally he should have decided it according to *Vaughan v. Burslem*, as considering himself bound by that case, and *Foley v. Barnell*, though he would confess he thought Lord Hardwicke's the better doctrine. He acquiesced in the opinion of the other Lords who modified the decree upon the principle laid down by Lord Hardwicke. In the said case of *Lady Lincoln v. the D. of N.* one of the remainder-men in tail having arrived at 21 before the cause came on, upon the appeal it was only necessary to determine that the leasehold estate should be

estate entitled in
equity to the
whole interest

declarations, as will best and nearest correspond and agree with the uses, trusts, powers, provisos, con-

assigned absolutely to him, and all the succeeding directions of the decree which had prospectively carried on the limitations upon the plan adverted to by Lord Hardwicke, in *Gower v. Grosvenor*, were left out, so that the decree as it finally stood, affords no precedent for the form of the limitations to be adopted in order to carry into effect the directory clause above-mentioned. His Lordship said that according to his opinion, the best principle would be that the testator ought to be considered as furnishing the Court with all the means of enabling the party to tie up the property, not as long as the rules of law would admit, but to that convenient extent which would enable the Court to execute the general primary purpose of the will or settlement to carry together the real and personal estate. And that principle clearly was not executed by the manner in which it was proposed to be done by the decree in that case; for by Lord Hardwicke's method, and the method pursued in the decree, it was not to go over upon the simple contingency of the death under 21, but upon the event of the son's dying under that age and without issue. Now under this form of limitation the son might upon arriving at the age of 14, bequeath the estate subject to the contingency of his dying under 21, not leaving issue, and supposing he died intestate, under 21 leaving issue, that issue male would not take the leasehold as he would the real estate, but the leasehold would be part of his general personal estate, which might go to the next of kin and equally to the wife with them. And if the going over were made to depend upon the simple contingency of the dying under 21, without regard to issue, then if an infant son died, leaving issue, the real and personal estates would be separated, the real going to such issue in tail, and the leasehold going to the next-remainder-man. Lord Eldon, however, did not suggest any other mode; and I am not aware of any other or better now in use among conveyancers. The attempt is subject to great danger and difficulty. If in order to carry the leasehold to the issue of the son dying under 21, together with the freehold estate, and to prevent its going to the next of kin, the limitation be to such male person as the age of 21, as would be entitled to the trust of the inheritance or possession; the limitation, if taken altogether, might be considered as too remote, for a son might die during the life of the father, under 21, leaving a son who might want a considerable time of attaining the age of 21, who also might die under the age of 21, leaving a son, who might be the first person attaining the age of 21 entitled to the possession, which seems clearly a suspension to too remote a period. And, indeed, the form adopted in the will to which this note is attached, seems not clear, as to the latter part of the provision, of this objection. If the trust of the leasehold or personalty were at once suspended from vesting till the lapse of the 21 years

ditions, restrictions, limitations, and declarations, hereinbefore limited, declared or expressed, of or concerning the hereditaments hereinbefore devised and directed to be settled as aforesaid, (other than and except the said terms of 99 years, and 2000 years hereby limited, and the trusts thereof), but so as such leasehold premises be not considered as an interest vested in equity, in any person who would become entitled in equity to the whole interest therein, until such person shall attain the age of 21 years, yet so as not to deprive such person during his, her or their minority, of the clear rents, issues, and profits thereof. And my will is, and I do hereby

therein, until such person shall attain 21.

after the death of the tenant for life, or the survivor of the tenants for life, if more than one, and then the estate were limited so as to vest in, or be assigned to the person who at that period would be entitled to the inheritance in possession of the real estate, unless the first remainder-man in tail should have attained the age of 21 during the life of the tenant for life, and have suffered a recovery of the freehold, and in such case to vest in such remainder-man subject to the estate for life, or estates for life then in being, the rents and profits being directed to be paid over in the mean time to the person entitled to the rents and profits of the real estate, perhaps, but I throw out the idea with the greatest suspicion and mistrust of its accuracy, this mode of shaping the trusts might carry the general intention of the settler into the fullest effect, by preventing the separation of the estates as far as their distinct natures would permit. These rules and observations apply to all personal estates, chattels, and goods where they are directed to go along with and accompany the freehold uses and estates, as far as the law will allow. And where the will directs the trustees, as to certain specific articles, to settle the same so as that they shall go with, and be annexed to the property of the mansion house, and premises, as heir-looms, the principles above considered are equally applicable. But where the will is not directory of a settlement, but limits the chattel to go as an heir-loom, it seems the first tenant in tail who comes into esse, will take it absolutely; see the *Duke of Bridgwater v. Egerton*, 2 Vez. 121. 1 Bro. C. C. 280 (n.) *Gower v. Grosvenor*, Barn Ch. R. 54. *Foley v. Barnell*, 1 Bro. C. C. 274, and *Vaughan v. Burslem*, 3 Bro. C. C. 101. What are proper heir-looms by the common law has been shortly considered in an early part of this book, and the reader will find much accurate information on the subject in Mr. Toller's book on the office of executors, where whatever is treated of is ably illustrated.

A catalogue of the books, and an inventory to be made of the plate, linen, china, pictures, prints, furniture, &c.

One to be delivered to testator's eldest son E—, one to the youngest son, and another to the trustees.

No articles to be removed until such inventory and catalogue shall be made. To his wife all the furniture in the house at —.

All his horses, cattle, and farming stock, to his eldest son absolutely: same as to his wines and liquors in — house.

To other children the furniture in their respective apartments.

direct, that as soon as may be after my decease, a catalogue of all my books shall be taken, and an inventory made of all my plate, linen, china, pictures, prints, furniture, and household goods at — house, such inventory to be made by two or more persons used and accustomed to business of this kind, one of them to be named by my eldest son, and the other or others by the said Sir G. C., R. M., J. D., J. C. J., and J. F., or any two or more of them, and three copies at least of the said catalogue and inventory respectively, shall be made and signed by the persons taking the same respectively, one copy of which said catalogue and inventory respectively shall be delivered to my eldest son, one to my youngest son, and one to the said Sir G. C., R. M., J. D., J. C. J. and J. F., or one of them; such last-mentioned copy of the said catalogue and inventory to be kept and preserved, with the books, papers, and receipts, relating to the trust estate as aforesaid: and I direct that no articles whatever be removed from my said house until such catalogue and inventory shall be taken and signed. I bequeath to my dear wife all the furniture in the house at —; I give and bequeath all my horses, and other cattle, and other my live stock, and all my farming and gardening implements and utensils, and also all wines, liquors, stores, and provisions, in or about my house at —, aforesaid, to my said eldest son, absolutely; I give to my daughter L. the whole of the furniture belonging to and commonly used in her apartments in — house, and to my younger son all my books, plate, china, pictures, linen, household goods and furniture, in the chambers he now resides in or may reside in, or occupy at the time of my decease, and also [various specific bequests].

A Will disposing only of personal Property.

This is the last will and testament of me, J. S. of T. in the county of ———, Esquire:—First, I will and direct, that in case I shall die within the distance of 10 miles from S. in the said county of ———, my body may be interred in the parish church there (where my late wife A. S. lies buried) in a decent but very plain manner, at the discretion of my executors hereinafter named (who, in case of any occurrence taking place to prevent my being buried at the place above mentioned, may direct my interment at such other place as they shall judge most proper) the expences attending which interment, and also all my just debts, and the expences of proving this will, and also the legacies hereinafter by me given, I do direct my executors to pay and discharge as soon as conveniently may be after my decease. I do hereby constitute and appoint A. B. of ———, C. D. of ———, and E. F. of ———, to be the executors of this my will; and, in the first place, I give and bequeath to them the said A. B., C. D., and E. F., as such my executors, the capital stock or sum of 8000*l.* five per cent. annuities, or so much of such other stock standing in my name at the time of my decease as will be sufficient to produce the annual sum of 400*l.* and in case I shall not at the time of my decease have sufficient stock standing in my name to produce that sum annually, then I give and bequeath to my said executors so much money as will be sufficient to purchase so much stock in one other of the parliamentary funds of Great Britain (according to the then current price thereof) as will produce such annual sum, (which stock I do hereby direct my executors to purchase accordingly) upon trust, that they my said execu-

Bequeaths a certain quantity of stock in the public funds to his executors.

The stock to be transferred into their own names, together with the names of the trustees in the settlement or articles made on the testator's marriage.

To pay the dividends to his wife for her life, and after her death the principal to sink into, and become part of, the testator's residuary estate.

That the said provision for his wife shall be in lieu of her dower.

Testator then gives 5000*l.* to his trustees.

To invest the same in the funds, in their names, or on real securities.

tors do and shall cause the said stock to be transferred into their own names, jointly with the trustees or trustee under the settlement or contract made on my marriage with my present wife J. S.; and do and shall pay the interest or dividends arising from such stock to my said wife (when and as the same shall from time to time arise and be received) during her life, for her own use and benefit; and from and after the decease of my said wife J. S. my will is and I do hereby direct, that the stock hereinbefore by me given or directed to be purchased for her benefit shall sink into and become part of my residuary estate, and shall go and be applied according to the dispositions hereinafter by me made of the same. Provided and I do hereby expressly declare my will to be, that the provision made by this my will for my said wife J. S. is by me intended to be, and to be accepted by her, in lieu and in full satisfaction and recompence of all such benefit or provision, as I have by such marriage settlement or contract provided or made; or covenanted, agreed, or contracted to provide, or make for her, either by way of annuity or otherwise howsoever; also I give and bequeath to A. B., C. D., and E. F. the sum of 5000*l.* of lawful money of Great Britain, upon trust, that they my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, place out and invest the same sum and every part thereof in their or his own names or name in the public stocks or funds of Great Britain, or on real or government securities in England, at interest, and do and shall stand and be possessed of and interested in such last-mentioned stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with, under and subject to the several powers and provisoes hereinafter expressed and declared of and concerning the same, that is to say, upon trust, that they my said executors and

trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my daughter Mary Elizabeth L. (wife of J. L. C. of B. in the county of _____) by her present husband, (other than and except an eldest or only son or an eldest daughter, entitled for the time being to the estate at B. aforesaid, which is entailed on the eldest child of their marriage) at such age, day, or time, if there be but one, and if more than one, then at such respective ages, days, or times, and in such parts, shares, and proportions, and subject to such conditions, restrictions, and limitations over (such limitations over to be for the benefit of some or one of the said children) as my said daughter M. E. L. at any time or times during her life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, or any codicil or codicils thereto, to be signed and published in the presence of and attested by two or more credible witnesses, (whether she shall be covert or sole, and notwithstanding any coverture she may be under) direct or appoint; and in default of such direction or appointment, then upon trust, that they my said executors and trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall transfer the said stocks, funds, or securities to such child, if there shall be but one, and the same shall be a daughter, on her attainment to the age of 21 years, or day of marriage, provided the same is entered into with the consent of my said daughter M. E. L., or if a son, upon his attainment to the age of 21 years; and if there shall be more such children than one, then my will is that the same stocks, funds, and securities, in default of

To transfer and assign the same last-mentioned stocks, &c. to the children of testator's daughter M. E. L. according to appointment of the said M. E. L.

And in default of appointment, among the children equally, with survivorship.

That any appointment of part shall stand good; but in case of a partial appointment, those who are the objects of it shall not come in with the rest, until they shall have so much of the unappointed residue as will make their shares equal.

such direction or appointment as aforesaid, be equally divided between or among them, share and share alike; the share or shares of such of them as shall be a daughter or daughters to be transferred to her or them respectively, on her or their attaining her or their age or respective ages of 21 years, or on the day or respective days of her or their marriage, which shall first happen, (provided such marriage shall be had with the consent * of my said daughter M. E. L.); and the share or shares of such of them as shall be a son or sons to become vested in him or them respectively, on his or their attaining his or their age or respective ages of 21 years. Provided nevertheless, and I do hereby declare, that the appointment to be made by my said daughter M. E. L. of any such portion or portions as aforesaid, pursuant to the power hereinbefore given to her, shall not be invalidated or prejudiced by any omission or default of her appointment of the residue of such portions, under or by virtue of any such direction or appointment made pursuant to the same power, but that any such child or children who shall be benefited by any such partial appointment shall have or be entitled to no further or other share of or in the unappointed residue of the said stocks, funds, and securities, until every other child shall have received so much of such unappointed residue as will make his or her share or portion equal if not otherwise so, to that of the child so taking under such direction or appointment as aforesaid. Provided and I do hereby declare, that if any such child or children, being a son or sons, shall depart this life before he or they shall attain his age or their respective ages of 21 years (without leaving lawful issue of his or their body or bodies) or being a daughter or daughters, shall depart this life before she or they shall attain her age or their respective ages of 21 years, or be married, then and in default of any such direc-

* See Note in page 527.

tion or appointment as aforesaid, the share or shares of him, her, or them so dying, of and in the said stocks, funds, and securities, shall go and accrue to the survivors or survivor, or others or other of such children, and be equally divided between or among them, if more than one, share and share alike, and be transferible at such ages, days, and times as his, her, and their original portion or portions shall, by virtue of this my will, become transferible as aforesaid: and that in case of the death of any other of the said children (without having lawful issue before such accruing or surviving share or shares shall become vested as aforesaid) then every such accruing or surviving share or shares shall again become subject and liable to such further right, chance, contingency, or condition of accruer or survivorship, as hereinbefore is declared touching the original portion or portions. Provided nevertheless, and I do hereby expressly declare, that in case any such child or children shall have left issue of his or their body or bodies lawfully begotten, then my will is that such issue shall have and be entitled to such share or shares of and in the said stocks, funds, and securities as his, her, or their deceased parent or parents would have had and been entitled to under this my will, if living, (such share or shares to be transferred to such issue at such age or time as hereinbefore declared with respect to the transfer of their parents' shares). And upon further trust, that they my said executors and trustees, or trustee for the time being, do and shall pay and apply the dividends, interest, and proceeds of the share or shares of such of the said children as shall not have acquired a vested interest in the share or shares hereinbefore provided or intended for him, her, or them, for or towards his, her, or their maintenance and education respectively, until the same respectively shall become transferible, until which period it is my will that my said daughter M. E. L. shall (if she shall so

In case of any dying and leaving issue, such issue to take the shares of their respective parents, at the same age and time as is before declared with respect to the shares of their parents.

The interest of their respective shares to be applied in maintenance.

That the daughter is to have the education and maintenance of her children.

The said sum of 5000*l.* to be received in lieu and satisfaction of the like sum of 5000*l.* secured by bond, to be paid to the husband of his daughter on the marriage.

Which said marriage portion cannot now be paid to the husband, on account of his mental imbecility. If any claim for such portion shall be set up and litigated, the trustees are to resist it, and defray the expences out of the residuary estate.

long live) have and be entrusted with the maintenance, education, and conduct of her said children, and shall receive from my said trustees or trustee such dividends, interest, and proceeds, for the purpose of enabling her to undertake, carry on, and defray the expences of the same. Provided, and my will is, and I do hereby expressly declare, that the said sum of 5000*l.* hereinbefore given and directed to be laid out for the benefit of the younger children of my said daughter M. E. L. by the said J. L. C. her present husband, is by me meant and intended, and shall accordingly be considered and be accepted, and taken, as and in lieu and full satisfaction and recompence of the sum of 5000*l.* which by a bond executed by me previous to the marriage of my said daughter with her said husband, I have secured to be paid for the benefit of such younger children, according to his appointment, which appointment, by reason of the mental imbecility of the said J. L. C. cannot now be made in a proper, reasonable, and effectual manner. And therefore my will further is, and I do hereby accordingly direct and declare, that in case any claim or demand shall be made, and any proceedings at law or in equity shall be commenced or instituted, either by the said J. L. C. or by any other person or persons, in his name, or on his account or behalf, or claiming by, from, through, or under, or in trust for him, upon or in respect of the said bond, or the said sum of 5000*l.* thereby secured, or any part thereof, or any interest to arise therefrom, my said executors and trustees, or the trustees or trustee for the time being, shall forthwith apply to the High Court of Chancery for redress against such claim and demand, or adopt such proceedings as they shall be advised to pursue by their counsel for resisting the same; the expences of obtaining which opinion of counsel, and of such application to the said court, and of all such other proceedings as shall be advised and adopted as necessary to resist such claim, I do hereby empower and direct my said

executors and trustees, or the trustees or trustee for the time being, to pay and discharge out of my residuary personal estate. And my will further is, and I do hereby expressly order, that in case any person or persons, for whom or for whose benefit a provision is hereby made, or intended to be made, shall make or prosecute any claim or demand for or in respect of the said bond, or the said sum of 5000*l.* or any part thereof, then and from thenceforth such person or persons shall be utterly excluded and debarred from all benefit or provision under or by virtue of this my will, or of the dispositions therein contained. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L. by the said J. L. C. her present husband, (other than and except an eldest or only son, and an eldest or only daughter, entitled for the time being to the said estate at B. aforesaid) who being sons, shall depart this life under the age of 21 years, without leaving lawful issue of their or any of their bodies, or being daughters, shall depart this life under that age and without having been married, then they my said executors and trustees, or the trustees or trustee for the time being, shall stand possessed of and interested in the said stocks, funds, and securities, or so much thereof as shall remain unappointed or undisposed of as aforesaid, in trust for, &c.

And if any body shall prosecute any claim upon the bond, this legacy to be void.

And I do hereby also give and bequeath to the said A. B., C. D., and E. F., their executors, administrators, and assigns the capital stock or sum of 800*l.* like five per cent. annuities, or so much of such other stock standing in my name at the time of my decease, as will be sufficient to produce the annual sum of 40*l.*; and in case I shall not at the time of my decease have sufficient stock standing in my name to produce that sum, then I give and bequeath

Testator devised 800*l.* capital stock to his trustees, to pay the dividends to the eldest son of his daughter, until he shall come into possession of the estate settled upon him, by way of support in the interim;

and when he shall come into possession of the settled estate, or if he shall die in the life-time of his father, then the said capital to sink into the residue.

An additional legacy to two grand-daughters.

to my said executors and trustees, so much money as will be sufficient to purchase as much stock (according to the then current price thereof) as will produce such annual sum, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall cause the same to be transferred into their or his own name or names, and do and shall, until my grandson J. L. the eldest son of my daughter M. E. L. shall come into possession of the estate at B. aforesaid, (so entailed on the eldest child of the marriage of my said daughter and her present husband, as hereinbefore mentioned) pay the interest or dividends, arising from the said stock, unto my said grandson J. L. and his assigns, and authorize and empower him and them to receive the same to and for his own use and benefit. Provided, and my will is, and I hereby direct, that from and after the decease of my son-in-law the aforesaid J. L. C. whereby my said grandson J. L. will come into possession of the said estate at B. aforesaid, or be entitled to the receipt of the rents, issues, and profits thereof, or in case my said grandson shall depart this life in the life-time of his said father, then from and after his decease, whichever shall first happen, the stock hereinbefore by me given, or directed to be purchased, for the benefit of my said grandson, shall sink into and become part of the residue of my personal estate, and shall go and be applied according to the dispositions thereof hereinafter contained. And I do hereby give and bequeath to each of my grand-daughters S. and M. (over and above their share in the said sums of 5000*l.* as two of the younger children of my said daughter M. E. L. by the said J. L. C. her present husband, and over and besides such other shares and benefit as they respectively shall have or take under this my will) the sum of 1000*l.* of lawful money of Great Britain, to be an interest vested in them respectively, on their respectively attaining the age of 21 years, or on their respective days of marriage with such consent

as hereinbefore mentioned, which shall first happen, nevertheless the actual payment thereof shall be postponed until after the decease of my said daughter M. E. L. (who during her life shall have and be entitled to the interest and produce thereof). Provided, and I do hereby declare, that in case either of my said grand-daughters S. and M. shall depart this life before she shall attain her age of 21 years, or be married, then the sum of 1000*l.* hereinbefore given to her, (in the event of her attaining such age or being married) shall go and be paid to the survivor of my said two grand-daughters, to become vested and payable as hereinbefore is mentioned in respect to her original share.

And in case both my said grand-daughters S. and M. shall depart this life under the age of 21 years, and without having been married, then the said two several sums of 1000*l.* (hereinbefore given to them in the event of their attaining such age, or being married as aforesaid) shall sink into and become part of my residuary personal estate, and shall go and be applied according to the dispositions thereof contained. And I do hereby give and bequeath to my said executors and trustees the like sum of 1000*l.* of like lawful money, upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall lay out and invest the same in their or his own names or name, or in or upon government or real securities in England, at interest; and do and shall during the minority of my natural son J. S. now aged 13 years or thereabouts, born at ———, on the 23d day of October, 1789, now at school at ———, pay, apply, and dispose of the dividends, interest, or proceeds of the said last-mentioned stocks, funds, and securities for and towards his maintenance and education, and in providing clothes and other necessities for him, in such way as my said trustees or

Gives 1000*l.* to be laid out by the trustees in the funds in their names, who are to apply the dividends in maintaining the testator's natural son.

And when he comes of age to transfer the stock to him for his own use.

With liberty to apply a certain sum as an apprentice fee, or for placing him out.

No part of such sum of 1000*l.* to be applied in paying any bills owing, at testator's death, for the said son.

If this sum not wanted, to sink into the residue.

trustee shall think advisable: and upon further trust, that when and so soon as my said natural son J. S. shall have attained the full age of 21 years, then that my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer and assign the said stocks, funds, and securities unto my said natural son, to and for his own use and benefit. Provided nevertheless, and I do hereby declare, that it shall and may be lawful to and for my said executors and trustees, or the trustees or trustee for the time being, to raise by and out of the said stocks, funds, and securities, upon which the said sum of 1000*l.* shall be so invested, any sum or sums of money, not exceeding in the whole the sum of ———*l.* for the purpose of placing out my said natural son J. S. apprentice, or otherwise for preferring or advancing him in or to any profession, business, or employment, and to pay, apply, and dispose of the money so to be raised for any of those purposes accordingly, in such way and manner as they or he shall judge most advisable for his benefit. (Provided nevertheless, and I do hereby expressly declare, that no deduction or abatement shall be made out of the said sum of 1000*l.* for or on account of any bills that may, at the time of my decease, be due or be accruing, for or in respect of the maintenance, education, or clothing of my said natural son J. S.; but that such bills shall be defrayed, with the rest of my debts, out of my residuary personal estate, before any division thereof shall be made.)

Provided, and my will is, and I do hereby declare, that in case my said natural son J. S. shall depart this life before he shall attain the full age of 21 years, then the said sum of 1000*l.* hercinbefore given and directed to be laid out for his benefit, or the stocks, funds, or securities wherein or upon which the same shall then be invested, or so much

thereof as shall not have been applied or disposed of for the advancement or preferment of my said natural son, according to the authority hereinbefore contained and given for that purpose, shall sink into and become part of my residuary personal estate, and shall accordingly be applied upon the trusts hereinafter by me directed concerning the same.

And I do hereby give and bequeath to my said wife J. S. for her own use and benefit, all my household furniture, plate, linen, china, liquors, provisions, and other household goods and furniture that may be in and about my dwelling-house at the time of my decease, save and except all books, papers, and manuscripts; it being my will and desire, and I do hereby direct, that such of the said books and papers as shall be necessary for settling or elucidating my affairs or concerns, shall be delivered to my executors hereinafter mentioned, and that such of the same books, papers, and manuscripts as shall not be necessary for that purpose, shall be delivered to my said daughter M. E. L. to be preserved or destroyed, or otherwise disposed of, as she shall think fit. Also I give and bequeath to my said present wife J. S. the sum of 200*l.* for the purpose of providing mourning for herself and children; and also the sum of 20*l.* for mourning to her servants: also I give to my said wife five guineas for a ring for herself, and 7*l.* 10*s.* for six mourning-rings, of twenty-five shillings each, for any six persons she may think proper to give them to: also I give to my aforesaid grandson J. L. my diamond ring, and to my grandson W. L. (second son of my said daughter, M. E. L.) or such other son of my said daughter as at the time of my decease shall be the second son in seniority, my gold watch, or in case my said watch shall be worn out, lost, or destroyed, 30*l.* in lieu thereof: and I give to my aforesaid son-in-law J. L. C. one guinea, to be paid to him at my death. I give to each of my said executors hereinbefore by me appointed twenty guineas for their care and

Gives to his wife all his furniture, plate, linen, china, liquors, &c.

Such books and papers as may be necessary for settling or elucidating his affairs, to his executors.

His other books and papers to his daughter.

200*l.* to his wife for mourning.

20*l.* for his servants' mourning.

To his wife five guineas for a ring, and a sum for six rings to friends.

Other specific bequests

Testator gives
all the rest and
residue of his
personal estate
to the same
trustees.

To convert
the same into
money, and
place it out in
the funds, or on
government
or real securities
in England,

And to stand
possessed of the
said stocks,
funds, and secu-
rities upon trust,
to pay the in-
terest and divi-
dends during his
daughter's life to
such persons as
she shall, not-
withstanding
her coverture,
direct and ap-
point.

trouble in the execution of this my will; and also a ring of the value of twenty-five shillings: also I give to my servant, S. (for her care and attention to me,) twenty guineas, to be paid to her within one month next after my decease. And as to all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, whereof or whereto, I or any person or persons in trust for me, shall at the time of my decease be possessed or entitled, (and not hereinbefore by me otherwise disposed of,) and whereof I have power to dispose by will, I do hereby give and bequeath the same unto my said executors, upon trust, that they the said A. B. C. D. and E. F. or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, with all convenient speed, collect, get in, and receive such part thereof as shall consist of money, or securities for money, and do and shall convert into money such part thereof as shall not consist of money, or securities for money, and lay out and invest the same, and every part thereof, in their or his own names or name, in the parliamentary stocks or funds of Great Britain, or on real or government securities in England, at interest; and do and shall stand and be possessed of, and interested in, all such stocks, funds, or securities, upon the several trusts, and to and for the several ends, intents, and purposes, and with, under, and subject to the several powers and provisos hereinafter expressed and declared, of and concerning the same, that is to say, upon trust, that they my said executors or trustees, or the trustees or trustee, for the time being, do and shall, during the natural life of my said daughter M. E. L. pay the dividends, interests, and proceeds of the said lastmentioned stocks, funds, and securities, unto such person or persons only, and for such intents and purposes only, as my said daughter M. E. L. shall, by any writing or writings under her hand, from time

to time, notwithstanding her present or any future coverture, direct or appoint, and in default of such direction or appointment, do and shall pay the same, or so much thereof as she shall or may from time to time happen to make no direction or appointment of into the proper hands of my said daughter M. E. L. for her sole and separate use and benefit, exclusively of the present or any future husband, who shall not intermeddle therewith, nor shall the same or any part thereof be subject or liable to the power, controul, debts, or engagements of any such husband, but the receipts of my said daughter M. E. L. and of such person or persons as she shall or may from time to time direct or appoint to receive the same, shall, notwithstanding her present or any future coverture, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed or acknowledged to have been received. Provided nevertheless, and my will is, and I do hereby expressly declare, that my said daughter M. E. L. shall not have power to sell, assign, mortgage, or otherwise incumber the said dividends, interest, and proceeds, or any part thereof, by anticipation, whilst in the hands of my said trustees or trustee; and from and after the decease of my said daughter M. E. L. (or in her lifetime, if she shall direct the same by any deed or writing under her hand and seal executed in the presence of, and attested by, credible witnesses,) upon trust, that they my said executors and trustees, or the trustees or trustee for the time being, do and shall transfer, assign, and pay the said last-mentioned stocks, funds, and securities unto all and every the child and children of my said daughter M. E. L., whether by her present or any after taken husband (other than and except an eldest or only son, or an eldest daughter, entitled for the time being to the estate at B——— aforesaid,) according to the appointment by deed or will, in like manner as herein-

And in default of appointment, into the proper hands of his daughter, for her sole and separate use.

Proviso that his daughter shall not incumber or anticipate the said dividends.

Power for the daughter to appoint the same either in her life-time, or after her decease.

And in default of appointment to and among her children, equally, with survivorship, except an eldest son, or eldest daughter, entitled as aforesaid.

before declared, with respect to the stocks, funds, or securities wherein or upon which the said sum of 500*l*. (hereinbefore given) shall be invested, and in default of such direction or appointment, then upon trust, that they my said executors and trustees, or the trustees or trustee for the time being do and shall transfer, assign, and pay the same stocks, funds, or securities unto all and every the child and children of my said daughter M. E. L. whether by her present or any future husband, (other than and except an eldest or only son or an eldest daughter entitled as aforesaid) in like manner and with the like condition of survivorship and power of maintenance and education to and amongst all such children, and subject to all such powers, provisos, and restrictions as hereinbefore declared, with respect to the stocks, funds, or securities, wherein or upon which the said sum of 500*l*. shall be invested. Provided also, and my will is, and I do hereby further direct, that in case all and every the child and children of my said daughter M. E. L. whether by her present or any future husband (other than and except an eldest or only son, or only daughter, entitled for the time being to the aforesaid estate at B.) shall depart this life before their said shares or any of them shall have become vested according to the directions of this my will, then my said trustees or the trustees or trustee for the time being shall stand possessed of, and interested in, all and every the stocks, funds, and securities, wherein or upon which my said residuary personal estate, or any part thereof, shall be placed out, or invested (or so much thereof as shall remain unappointed or undisposed of as aforesaid,) in trust, &c.

Power for the trustees to vary and transpose the securities.

Provided always, and my will is, and I do hereby declare that it may be lawful to and for my said trustees, or the trustees or trustee for the time being, (with the consent and approbation of my said daughter

ter M. E. L. signified in writing under her hand, if living, and if she shall be then dead, then of the proper authority of my said trustees or trustee for the time being,) to sell and transfer all or any of the stocks, funds, or securities, wherein or upon which any part of my property shall be placed out or invested, in pursuance of this my will (but not without the consent in writing of my said wife J. S. if living, in case any of the stocks, funds, or securities, desired to be sold or transferred shall form part of the security or provision hereinbefore provided for the benefit of my said wife during her life) and to lay out and invest the money to be produced by or from such sale or transfer, in or upon any other of the parliamentary stocks or funds of Great Britain, or on any other real securities in England, at interest, and from time to time (with the like consent and approbation as aforesaid,) to vary, alter, and transfer all such stocks, funds, and securities for other of the like nature, when and so often as it shall be desirable or convenient so to do; and that they my said trustees, or the trustees or trustee for the time being, do and shall stand possessed of, and interested in, all such new or other stocks, funds, or securities, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisos, declarations, and agreements as are hereinbefore declared or contained, concerning the stocks, funds, or securities, from the sale or transfer whereof such new stocks, funds, or securities respectively shall arise, or such of them as shall be then subsisting or capable of taking effect. Provided also, and my will further is, and I do hereby declare, that if my said trustees, or either of them, or any of their respective executors or administrators, or any future trustee or trustees to be appointed in the stead or place of them, or any of them as hereinafter is mentioned, or any of their respective executors or administrators, shall

Clauses for
changing trustees,
and for
their safety and
indemnity.

die, or be desirous of being discharged from, or decline to act, or become incapable of acting, in the execution of the trusts hereby in them reposed, or any of them, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for my said daughter M. E. L., by any writing or writings, under her hand and seal, (but having the consent of my said wife J. S., if living) to nominate and appoint any other person or persons to be a trustee or trustees in the stead and place of the trustee or trustees so dying, or desiring to be discharged, or declining or becoming incapable of acting as aforesaid, and that when and so often as any new trustee or trustees shall be so nominated or appointed as aforesaid, all the trusts, monies, stocks, funds, securities, and premises, which shall be then vested in the trustee or trustees so dying or desiring to be discharged, or declining, or becoming incapable of acting as aforesaid, either solely, or jointly with any other trustee or trustees, shall be thereupon with all convenient speed assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust monies, stock, funds, securities, and premises, and such new or other trustee or trustees, or if there shall be no continuing trustee of the same, then in such new trustees only, upon the same trusts and for the same intents and purposes as are hereinbefore expressed and declared of and concerning the same respectively, or such of them as shall be then subsisting or capable of taking effect; and that all and every such new trustees shall and may in all things act and assist in the management, carrying on, and executing of the several trusts herein expressed and contained, as fully and effectually to all intents and purposes, as if he or they had been originally appointed in and by these presents, or as the trustee or trustees, in or to whose place he or they shall succeed, might have

done if living, and continuing to act in the execution of the said trusts, And I do appoint my said executors to be the guardians of my several grand-children, and of my said natural son J. S., during their respective minorities. And my will further is, and I do hereby declare and direct that my said executors and trustees, and such new trustees as may be appointed in pursuance of the power hereinbefore contained, and each of them, their and each of their executors, administrators, and assigns, shall be charged and chargeable only with and for so much of the said trust monies, and premises as they respectively shall actually receive; and that one of them shall not be answerable or accountable for the others or other, or for the acts, receipts, neglects, or defaults of the others or other of them, but each of them only for his own acts, receipts, neglects, or defaults; nor shall they, or any of them be answerable or accountable for any banker, broker, or other person with whom or in whose hands any of the said monies may be placed for safe custody or otherwise, in the execution of any of the said trusts, nor for the insufficiency or deficiency of any stocks, funds, or securities, in or upon which any of such monies may be invested, in pursuance of and in conformity to this my will, nor for any other misfortune, loss, or damage, which may happen in the execution of the aforesaid trust, or otherwise in relation thereto, unless the same shall happen by or through their own wilful defaults respectively. And also that they my said trustees and executors, and such new trustees as may be so hereafter appointed as aforesaid, and each and every of them, their and each and every of their executors, administrators, and assigns, shall and may out of the monies, which shall come to their respective hands, by virtue of the trusts aforesaid, retain to and reimburse himself and themselves, and allow to his and their co-trustees and co-trustee, all costs, charges, and expences which they or any of them may

respectively sustain, expend or be put unto, in or about the execution of the trusts aforesaid, or in anywise relating thereto. And lastly, I do hereby revoke all former and other wills by me at any time heretofore made.

A Will equally dividing the testator's whole substance between his two sons, being his only children, subject to a provision for his widow.

THIS is the last will and testament of me, H. L. C. of —, &c. Esq.; my soul I humbly recommend* to the mercy of Almighty God, and I desire that my

* Of late years it has been the fashion, for there is a fashion even in the last acts of a man's life, to omit these solemn preambles. I confess myself an admirer of them, as believing it to be useful to the surviving relatives of the testator to draw their attention to the tremendous consequences of the separation of soul and body, at a season of impressibility and reflection: against the practice I perceive nothing but the dread of posthumous sarcasm, from those who find it convenient to brand with hypocrisy every sentiment of devotion, and who push their intolerance against the *open* believer beyond the boundary of the grave. A gentleman has put into my hands a will of one of the Judges, made just after the restoration, the preamble of which seems to me to be affecting and interesting.

In the name of God, Amen, I, Thomas L., of, &c. one of the Barons of his Majesty's Court of Exchequer, finding myself oppressed with many infirmities of body, through age, and suffering in these latter times, which puts me in remembrance that I have no long time to continue in this life, and that it is my duty to settle and dispose of that small remainder of estate which it has pleased God in his mercy and goodness to preserve to me, when so many virtuous men have lost all their possessions through the calamities of these unhappy times, do make this my last will and testament; first I commend my soul to the Lord of life, steadfastly believing that through the merits and satisfaction of his Son I shall obtain pardon for my many transgressions; and that having finished these ~~days~~ of

body may be interred without any unnecessary pomp or expence, in such spot as my executors may think convenient and proper for that purpose. In the first place, I charge all my estate and effects, of every description, with the payment of my debts, funeral and testamentary expences and such legacies as I shall hereinafter bequeath; and subject thereto, I give, devise, and bequeath unto my friends R. and S. all my messuages, farms, lands, estates, and hereditaments, with the appurtenances, wheresoever situate; and also all my personal estate and effects whatsoever and wheresoever, to and to the use of them the said R. and S., their heirs; executors, administrators, and assigns, for ever, upon the trusts, nevertheless, and to and for the intents and purposes, and with, under, and subject to the several powers, provisos, limitations, and declarations hereinafter limited, expressed, and declared, of and concerning the same respectively, (that is to say) upon trust, that they or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, as long as they or he shall continue to receive the rents, issues, and profits, of any of my said houses, tenements and hereditaments, under the dispositions of this will, or any of them, do see that the same are kept in all substantial and necessary repair, and that the same or such as have usually been insured from damage by fire, be still kept insured to such value and amount as has been usual with regard to the same respectively, taking care that the expence of such repairs or insurances fall respectively upon the person or persons beneficially interested in the same under the provisions of this my will, and that in case any such loss or damage shall happen, that the money to be

Testator gives
all his property
to trustees.

Upon trust out
of the rents and
profits of his
messuages and
hereditaments
to keep them in
good repair and
insured from fire.

And to lay out
the money re-

misery and mortality, I shall inherit everlasting quiet; and I give my body to the earth, whereof it was made, to be decently interred, without any superfluous charge or expence, in humble hope that it shall rise a glorious body at the general resurrection.

ceived upon the insurances in reinstating the premises destroyed or damaged.

Then to pay an annuity to his wife, to be reduced on her marrying again. And such reduced annuity to be paid to her exclusively of her husband, and not to be subject to his debts or engagements.

received upon or by means of such insurance or insurances, may be laid out in reinstating the same respectively, and do retain and apply so much of the rents and profits aforesaid, as shall be necessary in that behalf respectively; and subject and without prejudice to such the aforesaid trusts, upon trust, out of so much of the said rents and profits of all my said messuages and tenements as shall remain unapplied to the purposes aforesaid, and out of all the rest of my estates and effects hereinbefore devised and bequeathed to pay unto my wife E. C., or to such person or persons as she shall, by writing under her hand, appoint to receive the same, the yearly sum of 700*l.* of lawful money of Great Britain, as long as she shall live and continue my widow; and if she shall marry again, the said annuity of 700*l.* is to be reduced to 300*l.* of like lawful money; the said annuities of 700*l.* or 300*l.* as the case may happen to be paid half-yearly by equal payments on every 24th day of June, and 25th day of December in every year, and a proportionate part of such half-yearly payment (if any) as shall be accruing, and not have actually accrued due, at the time of her decease. The first payment of the said yearly sum of 700*l.* to commence and be made to her on the first of those days which shall happen after my decease, and the first payment of the said yearly sum of 300*l.* to begin and take place on the first of those days which shall happen after such subsequent marriage of my said wife. And my will is with respect to the last-mentioned annuity or yearly sum of 300*l.*; that the same may be paid into the hands of the said E. C., or unto such person or persons as she shall appoint, exclusively of any such after-taken husband, who is not to intermeddle therewith, nor is the same or any part thereof to be subject in any manner to such husband's control, debts, or engagements. And I will and declare that the receipts of my said wife, or of such person or persons as she shall appoint to

receive the said annuity, or the arrears thereof, shall, notwithstanding any such coverture, be good and effectual releases and discharges for the same or so much thereof as shall therein be expressed to have been received. And I further desire that my said trustees, or the trustees or trustee for the time being, out of the rents, issues, profits, and proceeds of all my said estates and effects, real and personal, but subject to all and every the trusts aforesaid, and to the annuity hereinbefore directed to be paid to, or to the appointment of, my said wife, do and shall pay unto my sister G. C., widow of, &c. or to such person or persons as she shall, by writing under her hand appoint to receive the same during her life, the yearly sum of 50*l.* of lawful money of Great Britain, by equal half-yearly payments, on the 24th day of June, and the 25th day of December, in every year, the first payment to commence and be made on the first of those days which shall take place after my death; and also do and shall out of the same rents, issues, profits, and proceeds, but subject and without prejudice to the aforesaid trusts, and to the said annuities, pay unto my niece C. L., or unto such person or persons as she shall, by writing under her hand, appoint to receive the same, during her life, the yearly sum of 70*l.* of like lawful money, by like half yearly payments, and the first payment thereof to be made on the same day as before-mentioned in respect to the annuity given to my said sister G. C., and subject to the several trusts and annuities aforesaid, do and shall stand and be seised and possessed of all and every my aforesaid real and personal estate so devised and bequeathed to my said trustees as aforesaid, upon the trusts following, (that is to say) as to my said herein-before-mentioned hereditaments and premises, situate at L. in the county of K., and at B. and C., in the county of R. for the sole benefit of my eldest son T. C., his heirs and assigns for ever. And as to all the residue of my

Gives other annuities.

And, subject to such trusts as aforesaid, to stand seised of the said estates and effects upon trust, as to certain premises, for the use and benefit of his eldest son, and as to all his other estates and effects, for the

use and benefit
of his younger
son.

To contribute
equally to the
said annuities.

Separate ac-
counts to be
kept of the
distinct shares.

Provision for
the education
and support of
his two sons out
of their respec-
tive shares.

Their education
confided to their
mother and
trustees, who
are appointed
guardians.

property herein-before devised and bequeathed as aforesaid, in trust for the sole benefit of my son J. C. his heirs, executors, administrators, and assigns, for ever. And I do hereby authorize and request the said trustees or trustee for the time being, so to pay and provide for the payment of the said several annuities hereinbefore made payable out of my general property as before-mentioned, as that the beneficial shares of my said two sons T. C., and J. C., be made contributory to and onerated with such payments in equal proportions, or as nearly equal as circumstances will permit, or can conveniently be done, and for facilitating such purpose and the general objects of my will, to keep separate accounts of the rents, profits and proceeds of the said beneficial shares. And I do hereby also direct, that until my said sons shall respectively attain the age of 24 years, my said trustees or trustee for the time being, shall receive all the rents, profits, and proceeds of all my said estates, property, and effects, and out of the surplus which shall remain in their hands after discharging the said trusts and paying the said annuities, and all arrears thereof, pay and allow out of their said respective beneficial shares for the maintenance and education of my said sons, until they respectively shall attain the age of 21, any annual sum not exceeding 200 l. per annum, and after they shall have attained such age respectively of 21 years, and until they shall respectively have completed the 24th year of their age, any annual sum not exceeding 300 l. according to the opinion of their guardians of the wants of their respective situations. And I hereby appoint my said wife E. C., together with the said R. and S., the guardians of my said children, and commit wholly to them and their love and prudence, the education and management of my said two sons, only that to either or each of my said sons, electing to pursue one of the three learned professions, divinity, law, or physic, and with their or his

own consent and express inclination, fixed as a student in either of our two English universities, I request my trustees or trustee for the time being, to advance and pay over and above such suitable allowance as aforesaid, the gross sum of 100 l. in order to enable him or them to purchase a competent collection of books, which sum of money I request the said guardians of my said children to see laid out in the purchase of such books only as are proper and safe to be perused and studied by them. And I desire it to be understood to be my wish and desire, that my said sons should follow liberal and learned professions, and receive an academical education at the university of Oxford or Cambridge. And I declare my will to be that my said sons, as and when they shall severally have attained the age of 24 years, shall respectively become entitled to receive the entire rents, profits, and proceeds of their respective shares of the said trust property, to which they will be entitled, under and by virtue of this my will, subject and without prejudice to the interests, charges, annuities, and trusts hereinbefore mentioned. And I do hereby direct that as and when my said sons shall severally have completed the said age of 24 years, if the said several annuities hereinbefore bequeathed shall previous to that time have ceased to become payable, or as soon after their severally attaining that age, as the aforesaid annuities shall cease to become payable under this my will, the said R. and S., or the survivor of them, or the heirs, executors, or administrators of such survivor, shall convey, assign, transfer, pay and make over, by proper and effectual conveyances, transfers, payments, and assurances in the law, to such of my said sons as shall have so completed the 24th year of his age, all the legal estate and interest of and in his share of the surplus of my said real and personal property, estate, and effects remaining after the discharge of the aforesaid trust, and payment and

The universities
and learned and
liberal profes-
sions recom-
mended.

And when the sons shall have attained 24, then upon their giving security for the payment of the annuities, their shares to be conveyed to them absolutely.

In case either shall die before 24, his share to survive.

And in case both sons shall die before 24, the trustees are to sell all the trust estates and effects, and vest the produce in the funds, and stand possessed thereof upon trust, to pay the interest and divi-

satisfaction of the said several annuities, charges, and allowances, in the manner hereinbefore mentioned. And furthermore, my will is, that when and as soon as either of my said sons shall have completed the 24th year of his age, if he shall consent to give such security and execute such deeds and assurances as to the satisfaction of the said trustees or trustee for the time being, shall sufficiently bind and secure the regular payment of his proportional contribution towards the said several annuities hereinbefore bequeathed, the legal estate of and in the said several species and kinds of property constituting such his said share above given to him, or intended so to be, (subject and without prejudice to any of the hereinbefore mentioned beneficial interests and charges), shall forthwith be transferred and made over to him, his heirs, executors, administrators, and assigns absolutely for ever. And I do hereby further declare my will to be, that if either of my said sons shall happen to depart this life before he shall attain 24 years of age, and without having been married, all his aforesaid beneficial estate and interest given to or intended for him by this my will, remaining after the full discharge of such payments and arrears as is hereby charged upon the same, or the same is hereby in anywise made liable to, and subject to such of them as shall still be payable thereout or charged thereupon, shall go and belong to the surviving brother, and be subject to such and the same provisos, restrictions, and powers to which all my said property and effects have hereinbefore been made liable. And in case both my said sons shall depart this life before they shall attain the 24th year of their age, and unmarried, my will is, that the said R. and S., or the survivor of them, or the heirs, executors, and administrators of such survivor, do and shall with the consent of the said E. C., if she be then living, and if she be dead, of their or his own proper

authority, sell and dispose of all the said property hereinbefore devised to them both real and personal, either together or in parcels, by public auction or private contract, for the best price or prices in money which can be reasonably obtained for the same, and convey the same accordingly. And I will and declare that the receipt or receipts of my said trustees, or the trustees or trustee for the time being shall be a sufficient discharge or discharges to the purchaser or purchasers thereof, or any part thereof, for the money for which the same or any part thereof shall be so sold as aforesaid, and such purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, or any of them, shall not be answerable for any loss, non-application or misapplication of such purchase-money, or any part thereof. And I give and bequeath the money arising from such sale or sales to the said R. and S., their executors, administrators, and assigns, upon trust that they or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall place out and invest the same in or upon any of the parliamentary stocks or funds of Great Britain, and do and shall vary and transpose such stocks for other securities of the like nature, when and so often as it shall seem meet to them, and do and shall pay the interest and dividends of the same unto my said wife E. C., as long as she shall live, or to such person or persons as she shall appoint to receive the same, and from and immediately after her decease, upon trust, that they the said trustees, or the trustees or trustee for the time being, do and shall pay or transfer all such principal monies, stocks, funds and securities, unto such persons, in such parts, shares, and proportions, at such days and times, and with, under, and subject to such powers, restrictions, limitations over and conditions, as I may hereinafter direct or appoint in any future will, codicil, testamentary paper, or other writing

dends to his wife for life, and after her death to transfer and pay the principal to such persons in such shares, &c. as testator shall appoint, and in default of appointment to and among testator's next of kin.

Trustees empowered to sell and dispose of any part of the personal estate which it may appear to them to be for the benefit of the younger son to dispose of, by sale, until he shall have attained the age of 24, and have the full possession of his share under the will.

The proceeds to be laid out in stock to accumulate till the son is entitled.

under my hand; and in case I shall make no such direction or appointment in respect thereof, or shall dispose only of part thereof, then my will is, that my said trustees or the trustee for the time being, do and shall dispose of all such the said principal monies, stocks, funds and securities, or so much thereof as shall remain unappointed and undisposed of by me, by any subsequent will or codicil, or testamentary paper, or other writing as aforesaid, to and amongst my nearest kindred precisely in the manner in which the statute made for the distribution of intestates' effects, would have disposed of my personal property in case of my dying wholly intestate. And I give to the said R. and S., whom I also constitute and appoint executors of this my last will and testament, full power, with the privity, consent, and approbation of my said wife, if she shall be living, and if she shall be dead, then of their own authority to sell and dispose of any part of my said personal estate and chattels real, for the most money that can be obtained for the same, if they shall deem such sale or disposal to be for the benefit of my said personal estate, until my said son J. C., who is to become entitled thereto under this my will, shall have attained his age of 24 years. And I request them as such executors, to call in any debts due to me upon bond or otherwise, but so nevertheless as to give a reasonable time to my bond debtors to discharge the same respectively, provided the interest be regularly paid, and the principal be not immediately wanted for the purposes and provisions of this my will, or some, or one of them. And my will is, that all such part of my personal estate and the growing proceeds thereof, as likewise the rents, issues, and profits, of all my real and leasehold estates, remaining in the hands of my said trustees, or the trustee for the time being, after discharging all the said several trusts, and keeping down the said several annuities above granted, as shall not be

wholly in the disposition of one of my said sons, by virtue of the beneficial estate and interest hereinbefore given to him, until the same shall be in the actual possession and disposition of my said sons respectively, by virtue of the provisions of this my will, or some or one of them, shall be invested and laid out in the purchase of stock in such of our public and parliamentary funds as the said trustees or trustee shall think most advantageous and desirable, and be permitted and caused to accumulate in the nature of compound interest, until the capital shall, by virtue of some or one of the aforesaid provisions of this my will, be respectively transferible to the persons beneficially entitled to it under the above dispositions, for the benefit of such his estate and interest; provided always, that the said trustees or trustee as aforesaid do and shall keep distinct and separate accounts of the stock so to be purchased as aforesaid, so as to correspond with and relate to the distinct titles and shares of my said sons, under my will as aforesaid. And I further desire and direct that if either of my said sons, having completed the 21st year of his age, shall be in treaty for a marriage becoming his condition, education, and family, and such as shall be fully approved of by my said wife if she be then living, and the other guardian or guardians appointed by this will, and if such guardians shall be then all dead, by the said trustees or trustee for the time being, he may be enabled, notwithstanding he may be under the age of 24, by the said trustees or trustee to make a suitable legal settlement of all or some part of his share of the real or personal property to which he will be entitled under this my will, upon such intended marriage, the terms and provisions of which settlement shall be in his own discretion: provided only that he enters into such bonds and covenants, and executes such reasonable other assurances, as shall be deemed by the said trustees or

If either of his sons shall be in treaty for a suitable marriage before 24, with the consent of his mother and guardians, trustees are to enable him to make a suitable settlement.

If testator's wife
should claim her
settled jointure,
then she is to
take no benefit
under the will.

trustee as aforesaid, sufficient to bind and secure to the persons entitled to any annuities or benefits out of or charged upon his said share or division of my testamentary property, the full and-regular payment and satisfaction thereof. And it is my will, that upon such marriage, with such consent and at such age as aforesaid, of either of my said sons, he shall have all the benefit and privileges which have hereinbefore been provided for him on his attaining the age of 24; and that the whole property given to him by this my will shall, upon the said annuities and charges being secured as aforesaid, ultimately and absolutely vest in him, discharged of the said contingency of survivorship in the other brother. And I declare my will to be, that if my said wife E. C. shall insist upon receiving her jointure of 300*l.* per annum, which was settled upon her by our marriage settlement, bearing date the 19th day of February, 1772, and secured by way of rent charge upon some of the hereditaments and premises above devised to my said trustees upon the trusts hereinbefore-mentioned, she shall take no benefit under this my will; but the same, as far as respects any provision for her or disposition in her favour, shall be void and of no manner of effect: and in the event of her attempting to enforce her claims to such jointure or any part thereof, by any of the powers or remedies given to her, or her trustees, by the said settlement for that purpose, I do direct, that in every such case the trustees, or trustee for the time being, under this my will, do and shall, instead of paying to my said wife the annuity or annuities hereinbefore provided for her, or any part thereof, make such disposition of the rents and profits of my said estates hereby devised to them, and which they are hereby empowered to receive, as that my eldest son, for whose share the estates charged with the said jointure are hereinbefore intended, may receive a complete indemnification, and the just proportion between my

two sons, as to the benefit to be derived to them under this my will, may be equally preserved and maintained. [The proper clauses for the safety and indemnity of the trustees.]

And lastly, I do hereby solemnly revoke all former wills and testaments at any time heretofore by me made, and declare this only to be my last will and testament.

A Will comprizing directions for a Settlement of freehold, copyhold, and leasehold Estates, with various limitations and provisos, by way of annuities and rent charges; containing also various bequests of chattels and sums of money.

I, J. W., of ———, do make this my last will and testament in manner and form following, I desire to be decently interred at ———, at the discretion of ———, my executors hereinafter named; and I give and bequeath unto my wife A. all my household goods and furniture, plate, jewels, watches, linen, china, pictures, books, and wearing apparel of what nature or kind soever, as well at my town residence as at my residence at ——— afore-said; and also all my coach-horses, saddle-horses, coach, chaise, and other carriages, and the harness, saddles, bridles, furniture, and other things belonging and appurtenant thereto, together with the live and dead stock(1), farming utensils, and imple-

His furniture,
plate, pictures,
books, &c. to his
wife absolutely.

(1) The devise of the 'stock upon the farm' carries the standing crops of corn growing there at the time of the testator's death. Thus, in a late case, where the devise was of all his (the testator's)

Confirms an estate before settled upon her, and adds a further life-estate on other premises.

With a power of leasing.

ments of husbandry whatsoever, which shall be at, in, or upon or about my estate at ——— aforesaid, at the time of my decease, to and for her own proper use absolutely, for ever; also I confirm to her my said wife the surrender made to her use, for life, of my copyhold estate at ———. And I do hereby give and devise unto her my said wife all my freehold estate, with the appurtenances at ——— and ——— aforesaid, to hold the same to and for the use of her my said wife A. and her assigns, for and during the term of her natural life, (if she shall so long continue my widow) she keeping the same in repair, and paying the quit rents (if any) and taxes: and I give to her, during the continuance of her respective estates, full power to grant leases of the said freehold premises, and also of the said copyhold premises, so far as the custom of the manor will allow, for any term or terms not exceeding three years, in possession and not in reversion, so as the best improved rents be reserved incident to the reversion without taking any fine, and the lessees be not made dispunishable for waste, and so as there be contained therein a proviso for re-entry for nonpayment of the rents thereby reserved, and so as such lessees do execute counterparts of such leases, and covenant for the due payment of such rents; and as to, for, and concerning the remainder or reversion of the said copyhold estate so surrendered to the use of my said wife for her life, expectant on her decease, and as touching and concerning the said freehold premises hereinbefore given to her during her widowhood, from and im-

money, &c. 'stock upon his farm,' with the implements of husbandry, and all his personal estate of what kind or nature soever, to his executors, in trust to pay debts and legacies, it was held that the devise of the stock on the farm carried the standing crops of corn from the devisee of the land to the executors, though there were assets to pay all the debts and legacies without that aid; 8 East. 339, and see Ch. 1, P. 8, of this treatise.

mediately after her decease or second marriage, which shall first happen, and also as to, for, and concerning all other my manors, messuages, farms, lands, tenements, and hereditaments (2) situate and being in the said county of _____, and in the counties of _____ and _____, or elsewhere, freehold, copyhold, and leasehold, whether in

(2) The general words 'messuages, farms, lands,' are sufficient to carry *copyhold* as well as freehold, if such appears to be the general intention of the testator, 9 East. 448, *Doe d. Belasyse v. Earl of Lucan*.

An estate, whether strictly copyhold to all intents and purposes, or *customary estate*, the freehold of which is in the lord, may pass under the description of copyhold in a will, the intention being manifest, 7 East. 299. *Doe d. Cook v. Danvers*; and even where the freehold is in the tenant, if the lands are generally and popularly reputed copyhold, and the intent is apparent, they will pass under the description of copyhold, 5 East. 57, *Roe d. Conolly v. Vernon*.

The word 'lands,' prima facie, is applicable only to freeholds, 3 Bro. C. C. 188, *Lindop v. Eborall*; but it may include all descriptions where the intention is apparent; 2 Bos. et Pull. 303, *Thompson v. Lawley*. And where the testator has only leaseholds they will pass by this word, for otherwise the will would be void, 2 Atk. 451, *Knotsford v. Gardiner*, Cro. Ca. 293, 1 P. Wms. 286, 3 P. Wms. 26, 1 Vez. 272, 2 P. Wms. 456, 459, Ambl. 356. But 'lands' has been held not to pass leaseholds, if there is afterwards a particular bequest of 'personal estate' to another; see 1 H. Bl. 26, note. It appears to be fully settled that 'lands' will carry a 'reversion,' 3 Atk. 492, *Allen*, 28, 3 Vin. 294, pl. 7. 'Manors' should always be added where such are meant to pass; for though if a man have only a manor in Dale, the words 'lands and hereditaments in Dale' will pass the manor as an *hereditament*; yet if he have a manor in Dale, and also land there, not parcel of the manor, it is said to be a question whether the manor will pass by a devise of 'all my lands,' 3 P. Wms. 322, *Haslewood v. Pope*.

The word 'estate' or 'estates' or 'property,' in a will, generally passes the fee, and words of local description, if added, will not restrain the effect of this word; as if a testator devise all his estate known by the name of _____, in the parish of _____, *Roe d. child and wife v. Wright*, 7 East, 259; but these words may be restrained in their sense and effect, as where the general phraseology and associated words shew something less to have been intended by them, 9 Vez. jun. 137, *Woolham v. Kenworthy*, 2 N. R. 214, *Roe v. Yeud*. And where A. seised of lands in fee, by will, gave several legacies, and in the succeeding sentence gave the rest of his

All the residue
of his estates, of
all kinds, to
trustees.

To raise, by sale
or mortgage,
such sums as
shall be sufficient
to make good
any deficiency of
the personal es-
tate in paying
the legacies,
debts, &c.

possession, reversion, remainder, or expectancy, whereof I have power to dispose, I give, devise, and bequeath the same, and all my estate and interest therein respectively, unto and to the use of my wife A. and my friends ——— and ———, according to the nature of the same estates respectively, upon the trusts, nevertheless, and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations hereinafter expressed and declared of and concerning the same respectively, (that is to say) upon trust, that they the said trustees, or the survivor or survivors of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, by sale or

estate, chattels, real and personal, &c. to J. S. it was held that nothing but his *chattels* passed by the word *estate*: but where the words were 'all my goods, chattels, and personal estate, *together with my real estate*,' the land and inheritance were held to pass, notwithstanding the accompanying words, 3 Atk. 486, and see 1 H. Bl. 2. 'Premises' will include any real property before given, whether in possession or only in reversion, 1 East. 456, and see the force of 'elsewhere,' Cowp. 363. For the effect of the word 'appurtenances' see 1 Bos. et Pull. 53, Buck d. Whalley v. Nurton.

A freehold may pass by a will giving the estate a local description and a name, though it be mistakenly called 'leasehold', if there be no other property answering the name and description, 9 East. 366, Doe d. Wilkins v. Kesneys. And nothing is more decided in regard to the construction of wills than, that no words are so inflexible as not to bend to the intention, when it is clearly deducible from the will itself. Thus even where a testator has used the phrase *personal estate*, he has nevertheless been construed to mean to include *real estate* under that description, as appears from the very recent case in King's Bench of Doe on dem. Tofield v. Tofield, see the 10th vol of Mr. East's reports.

As to the force of introductory words, as 'all my worldly estate or substance;' Cowp. 657, Denn d. Gaskin v. Gaskin, Dougl. 750, Right v. Sidebotham, 1 N. R. 335, Doe d. Wright and others v. Child, 2 N. R. 343, Doe d. Briscoe v. Clarke. 'A devise of all the residue of testator's effects real and personal' carries the fee, Cowp. 299, Hogan v. Jackson, 2 N. R. 383, Goodtitle d. Castle v. White. Where lands are given after payment of debts, &c. as to what estate passes, and for the distinctions on this point see 1 Bos. et Pull. 558, and 2 Bos. et Pull. 247, Denn d. Mellor v. Moore, in error, and 2 N. R. 343, Doe d. Briscoe v. Clarke.

mortgage, demise, or other disposition of the several estates and premises, or a competent part thereof, or by, with, and out of the rents, issues, and profits to arise therefrom in the mean-time, or by all or any of the aforesaid, or by such other, ways and means as to them, him, or her shall seem meet, raise and levy such sum or sums of money as shall be sufficient to make good the deficiency of my personal estate, not specifically bequeathed, in answering and satisfying my debts, legacies, annuities, and funeral and testamentary charges, and for facilitating such sale or sales, mortgage or mortgages, I will and declare, that the receipt or receipts of the said _____ and _____, or the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall be a sufficient discharge or discharges for the purchase or mortgage money, agreed to be paid or advanced either by way of purchase or loan, for or upon my said several estates and premises, or any part or parts thereof respectively; and the person or persons paying or lending the same, his, her, or their heirs, executors, administrators, or assigns shall not be liable to answer any loss, misapplication, or nonapplication thereof respectively: and subject and without prejudice to the aforesaid trust, I will and direct that the said trustees, or trustee for the time being, do and shall stand, and be seized and possessed of my said several freehold, copyhold; and leasehold estates and premises, or so much thereof respectively as may remain unsold, upon the following trusts, (that is to say) as to my freehold estates and premises, upon trust, to convey, settle, and assure the same, subject to any such mortgage or mortgages as may be so made as aforesaid, to the uses hereinafter-mentioned, or so many of them as at the time of such settlement shall be subsisting or capable of taking effect, that is to say, to the use, intent, and purpose that my said wife may receive thereout one annuity or yearly rent charge of ———/l. clear of all taxes and without deduction, for her life,

Their receipts to be discharges.

To remain seized and possessed of such and so much of the said estates as should not be sold for the said purposes, upon trust, to convey and settle the same to the uses after-mentioned, viz. to the intent that his wife may receive an annuity over and above the provisions already made for her, to be in lieu of dower.

And to the use and intent that B. may receive an annuity of ————l.

And to the further use and intent that the trustees may receive an annuity for the life of J. W. (that is to say) during her minority ————l. from that time till marriage ————l. and after her marriage ————l.; to apply the said annual sum of ————l. during its continuance for her maintenance, the second sum of ————l. during its continuance to be paid to her for her absolute use, and the third sum of ————l. to be paid to her for her separate use, exclusively of her husband.

to and for her own sole and separate use and benefit (over and above all other provisions I have made for her); but nevertheless I do hereby declare, that the provisions hereby made or intended, to and in trust for my said wife, shall be accepted by her as and for her jointure, and in lieu and full satisfaction of all dower and thirds or free bench to which she is, can, or may, or otherwise might be, entitled out of all or any of my estates at the common law, or by custom: and to the use and intent that B. the wife of ————, may receive one annuity or clear yearly rent charge of ————l. for her life, clear of taxes and without deductions, for satisfaction of the like yearly sum to the payment of which to her I am liable: and to the use and intent that my said trustees and their heirs may receive thereout, upon the trusts hereinafter expressed, the following annuities or yearly rent charges, clear of taxes and without deductions, for the life of Jane W. daughter of ————, that is to say, so long as she shall be under the age of 21 years and unmarried, the clear annuity or rent charge of ————l. and after she shall attain the said age then the clear annuity or rent charge of ————l. so long as she shall continue unmarried, and after her marriage the clear annuity or yearly rent charge of ————l. for the remainder of her life, in trust, to apply the said annuity or rent charge of ————l. during its continuance for or towards her maintenance and education, the said annuity of ————l. during its continuance to her for her absolute use, and that of ————l. during its continuance into her proper hands, or to her appointee or appointees in writing under her hand, to the intent that the same may be for her sole and separate use, exclusive of her husband for the time being, and may not be subject to his power or controul, debts or engagements, and for which the receipts of her, or such her appointee or appointees, shall be effectual discharges, notwithstanding her coverture. And

to the use and intent that the several other persons hereinafter named may receive out of the same premises the several annuities or yearly rent charges hereinafter mentioned, for their respective lives, clear of taxes and without deductions, that is to say, my sister J. R. one annuity or yearly rent charge of ———l. for her life; H. D. (husband of my late sister M. D.) one annuity or yearly rent charge of ———l. for his life; my niece M. A. (daughter of my said late sister) one annuity or yearly rent charge of ———l. for her life; my niece E. B. (daughter of my late sister E. S.) one annuity or yearly rent charge of ———l. for her life; E. B. (son of my said niece E. B.) one annuity or yearly rent charge of ———l. for his life; my niece J. M. (the wife of T. M.) one annuity or yearly rent charge of ———l. for her life; my niece I. M. (the wife of J. M.) one annuity or yearly rent charge of ———l. for her life; E. B. (my wife's brother) one annuity or yearly rent charge of ———l. for his life; A. B. (my wife's sister) one annuity or yearly rent charge of ———l. for her life; E. A. (daughter of N. J. deceased) one annuity or yearly rent charge of ———l. for her life; E. W. (my late housekeeper) one annuity or yearly rent charge of ———l. for her life; and J. P. one annuity or yearly rent charge of ———l. for his life; all the said several annuities or yearly rent charges hereinbefore directed to be paid out of, and charged upon, the said estates and premises in such settlement to be comprised, to be paid to the said annuitants respectively, by equal quarterly payments, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year; the first quarterly payment of the said annuities respectively to begin and be made on the first of the said quarter days that shall happen next after my decease, with powers of distress and entry upon, and perception of the rents and profits of the same premises, to be limited and reserved to the said

And to the use and intent that the several other persons after-named, may receive the several annuities or rent charges after-mentioned for their respective lives, (that is to say) that J. R. may receive, &c. &c.

And subject thereto, and to the powers and remedies for recovery thereof, to the use of testator's son and sons successively in tail male, remainder to his daughters as tenants in tail, with cross remainders.

Remainder to the heirs of his own body.
Remainder to W. W. for his life, and his children in strict settlement.

Remainder to the use of the trustees during the life of J. J. upon the trusts after-mentioned, and to the children of J. J. in succession in tail male.

several annuitants in the usual manner, for better securing and compelling the payment of the said several annuities or yearly rent charges. And as to the said estates and premises so to be charged, and subject thereto, and to such powers and remedies for recovery thereof as aforesaid, to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of my body, lawfully issuing, (whether born in my life-time or after my death) severally and successively, and in remainder one after another, as they shall be in priority of birth, in tail male; remainder to the use of all and every the daughter and daughters of my body, lawfully issuing, (whether born in my life-time or after my death) in tail general, to take as tenants in common if more than one, with cross remainders among them as tenants in common in like tail general; remainder to the heirs of my body, lawfully issuing; and for default of such issue, to the use of W. W. (son of W. W. late of ———, deceased) and his assigns, for his life, without impeachment of waste; remainder to the use of my said trustees and their heirs, during his life, in trust, by the usual ways and means, to preserve the contingent uses and estates, in such settlement after to be limited, from being defeated or destroyed, but to permit him and his assigns to receive and take the rents, issues, and profits of the said estates and premises, during his life, to his and their own use; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said W. W. the son, severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs, during the life of my nephew J. J. upon the trusts hereinafter declared concerning the same; remainder to the use of the first, second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of my said nephew J. J.

severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my said trustees and their heirs during the life of my said niece, J. M., upon the trusts hereinafter declared concerning the same; remainder to the use of the 1st, 2d, 3d, 4th, 5th, 6th, and all and every other the son and sons of the body of the said J. M., severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of L. W., upon the trusts hereinafter declared concerning the same; remainder to the use of the 1st, 2d, 3d, 4th, 5th, 6th, and all and every other the son and sons of the body of the said L. W. severally and successively, and in remainder, one after another, according to their priority of birth, in tail male; remainder to the use of the said trustees and their heirs, during the life of J. L., upon the trusts hereinafter declared concerning the same; remainder to the use of the 1st, 2nd, 3rd, 4th, 5th, 6th, and all and every other the son and sons of the body of the said J. L. severally and successively, and in remainder one after another, according to their priority of birth, in tail male; remainder to the use of my trustees and their heirs, during the life of my said sister J. T., upon the trusts hereinafter expressed and declared of and concerning the same; remainder to the use of all and every the daughters and daughter of the said J. T., lawfully begotten, or to be begotten, and of all my said brothers and sisters, lawfully begotten or to be begotten, in tail general, to take as tenants in common, if more than one, with cross remainders among them as tenants in common, in like tail general; remainder or reversion to the use of my own right heirs. And as to the several and particular uses and estates hereby directed to be limited in such settlement, in remainder

Same limitations
to others and
their families.

And as to the uses and estates directed to be limited in such settlement to the said trustees during the lives of the said J. J. J. M. L. W. J. L. and J. T. in trust, not only to preserve the contingent remainders therein to be limited, but to manage and improve the estates for the benefit of the persons next entitled.

to the said trustees and their heirs, during the respective lives of the said J. J. J. M. L. W. J. L. and J. T., such uses and estates shall therein be declared to be so limited to the said trustees and their heirs, during the continuance of the same respectively, in trust, not only to preserve by the usual ways and means, the several contingent remainders therein to be limited, but to manage and improve the said estates and premises, in such manner as to them the said trustees or the trustees or trustee for the time being shall seem meet, and to receive the rents, issues, and profits thereof, and to pay or apply the same, or so much thereof as shall remain, after retaining or discharging the expences of repairs and improvements, and all taxes and other necessary outgoings, and the poundage, salaries, or wages of such person or persons, agent or agents, as they, he, or she may think fit to appoint or employ to oversee, manage, and improve, and receive the rents, issues, and profits of, the said premises, to or for the benefit of such person or persons as for the time being shall, under the limitations in such settlement, be entitled to the next estate, of and in the said manors and premises therein comprised, expectant on the particular use or estate, for the time being, vested in possession in my said trustees or their heirs, in trust as aforesaid, but subject to a proviso to be inserted in such settlement, that if the person or persons for the time being entitled to such next estate, or any of them, be a minor or minors, and unmarried, then during the period that such person or persons, or any of them, shall be a minor or minors, and continue unmarried, such part of the net rents, issues, and profits of the said premises as such unmarried minor or minors would be entitled to, if he, she, or they was or were married, or adult, shall be disposed of by the said trustees or trustee for the time being in the following manner, that is to say, any such yearly sum or sums, or such part thereof, as they, he, or she, in their, his, or her discretion shall think ne-

Directions for the disposal and application of the rents and profits, in case the persons so next intitled shall be minors.

cessary, not exceeding —l. per annum, shall be applied for or towards the maintenance and education of such minor, or for each such minor, if more than one, until he or she shall attain the age of 14 years, and after that age, and until he or she shall attain the age of 18 years, or shall be married, any yearly sum or sums not exceeding —l. per annum for such minor, or each such minor, and after the age of 18 years, and until he or she shall attain the age of 21 years, or be married, any yearly sum or sums not exceeding —l. per annum, for such minor or each such minor; and the surplus of such net rents and profits as such unmarried minor or minors would, if married or adult, be entitled to, remaining unapplied for the last-mentioned purpose, shall, during such period, be considered as constituting part of my residuary personal estate, and be subject to the disposition hereinafter made thereof, and to all the trusts and powers in this my will contained, respecting the same. And I will and direct that there shall be inserted in such settlement a power or proviso enabling the said W. W., as and when he shall be in the actual possession or entitled to the rents, issues, and profits of the said estates and premises so to be settled by deed or will, to grant, limit, settle, or appoint to, or to the use of, or in trust for, any woman or women, whom he shall happen to marry, (and that either before or after such marriage,) for and during the natural life or lives of of such woman or women respectively for her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after his decease, any annual sum or yearly rent charge, annual sums or rent charges, not exceeding —l. by the year, tax free, and without any deduction, to be issuing out of, and to be charged and chargeable upon all, or any part of the said estates and premises, with such powers and remedies for recovering the same when in arrear, and to create and limit such term or

To apply certain sums for their maintenance, varying with their respective ages.

The surplus of the said rents and profits in the mean time to fall into the residue of testator's personal estate.

Settlement to contain a power for the tenant for life to jointure any woman he may marry.

And also a
leasing power.

Settlement to
contain a pro-
viso for obliging
the persons tak-
ing under the
limitations to
use the testa-
tor's surname.

terms of years for raising and better securing the same, as to him shall seem meet. And it is also my will, that in such settlement there shall be inserted a power or powers enabling the said W. W. and also the trustees or trustee for the time being under such settlement, as and when they shall respectively be in the actual possession, or entitled to the receipt of the rents and profits, of my said manors, hereditaments, and premises, under the limitations therein contained, and also during the minority or minorities of any such child or children as may be entitled to the freehold and inheritance thereof, under such limitations as aforesaid, to make leases of all or any part of the said premises for any term not exceeding 21 years in possession, and not in reversion, or by way of future interest, so as there be reserved in every such lease the best and most improved yearly rent, to be incident to the immediate reversion of the premises so to be demised, that can be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for the making thereof, and so as there be contained in every such lease a condition of re-entry on non-payment of the rent thereby to be reserved, and so as the lessors execute counterparts thereof, and do thereby covenant for the due payment of the rents, to be thereby reserved, and be not made dispunishable for waste. And it is my will, that in such settlement there shall be inserted a proviso, condition, or clause, enjoining the issue male of my said niece J. M. within six calendar months next after such issue male shall come into possession of the said estates and premises, under the limitations in such settlement, to assume, take, and use the surname of W. only, and to write and sign that surname only in or to all acts, deeds, and instruments, and on all other occasions, and for determining the estate tail of such issue, refusing or neglecting to comply with such condition, and limiting the said estates and premises over to those who may be next in remainder expectant on such

estate tail, under such settlement, or who would be intitled to the possession of the said premises, under the limitations in such settlement, in case the tenant in tail male so refusing or neglecting, were actually dead, without issue male. And my will further is, that such intended settlement shall contain a proviso that in case any of the trustees therein named, or any succeeding trustee or trustees in their or any of their place or places (whether introduced into the trusts therein contained by nomination or appointment as hereinafter mentioned, or by representation of any deceased trustee or trustees,) shall die, or desire to be discharged from, or refuse or neglect to act, or become incapable of acting in the execution of such trusts, or any of them, it shall be lawful for the surviving or other trustees or trustee for the time being (whether he, she, or they may have been created a trustee or trustees by nomination or appointment, or have become so by representation as aforesaid,) by deed or instrument, under hand and seal, attested by two or more witnesses, to nominate and appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying, desiring to be discharged, or refusing or neglecting to act, or becoming incapable of acting as aforesaid; and a clause making the usual provision for vesting the trust estates, real and personal, according to such nomination or appointment, and for giving the same its full effect, and enabling the new trustees or trustee to execute every trust and power which the old trustee or trustees might have done if such appointment had not taken place, either alone or in conjunction with the continuing trustee or trustees (if any) as the case shall happen. And also the usual clause for the indemnity of the trustees or trustee therein named, their heirs, executors, administrators and assigns, and for enabling them to act with safety in the execution of the trusts of such settlement, and such other clauses as are usual in settle-

Settlement to contain a proviso for empowering a change and substitution of trustees to be made from time to time.

And the usual clauses of safety and indemnity to the trustees.

Trustees to stand seised and possessed of the copyhold and leasehold estates upon correspondent trusts.

Trustees to renew the leases as and when they shall think proper.

All the renewed leases to be vested in the trustees upon the same trusts.

ments of the like kind. And as to, for, and concerning my said copyhold and leasehold estates and premises, or so much thereof as may remain unsold, for making good the deficiency of my personal estate, not specifically bequeathed, in answering my debts, legacies, and funeral and testamentary charges, I will and direct that the said trustees or the trustees or trustee for the time being do and shall stand seised and possessed of the same respectively, (subject to any such mortgage or mortgages as may be made thereof as aforesaid,) upon such trusts, and for such intents and purposes as are hereinbefore directed to be limited or expressed, of, and concerning the said freehold manors and premises therein to be comprised, and with, under, and subject to such and the same powers, provisos, conditions, limitations, and declarations, as are directed to be contained therein, concerning the same freehold manors and premises, or as near thereto as can or may be, and the rules of law and equity and the different natures of the estates and tenures will admit. Provided, that it shall be lawful for my said trustees, their executors, administrators, and assigns, as and when they in their discretion shall think proper or see occasion, to renew the lease and leases of all or any part of my leasehold premises, and pay the fines and fees, and other expences necessary to be paid for such renewal or renewals, out of any monies which may be in their hands by virtue of this my will, and to rebuild or repair all or any of the messuages or tenements, to be demised by such renewed lease or leases, (if such renewal shall be obtained on terms of rebuilding or repairing,) and to pay the expences of such repairing or rebuilding, in like manner as I have directed with respect to the expences of such renewals aforesaid; all which renewed leases shall be vested in them the said trustees, their executors, administrators, and assigns, upon the same trusts, and for the same intents and purposes, and with, under, and subject to the same powers, provisos, conditions, and de-

clarations, as are contained and referred to in this my will concerning the present subsisting leases, or the premises therein comprised. Provided, and my will further is, that it shall be lawful for my said trustees, their heirs, executors, administrators, and assigns, in the mean time, until such settlement of my said estates shall be made as herein before directed, to make or grant leases of all my said freehold, and also of my said copyhold and leasehold manors and premises hereinbefore devised to them upon trust as aforesaid, which may be remaining unsold, for any term not exceeding 21 years in possession, reserving the improved rents, and without taking fines, and subject to the like restrictions as are mentioned with respect to leases to be made under the power of leasing directed to be inserted in the said intended settlement, and to appoint such persons as they shall think proper to oversee, manage, and improve my said estates and premises, and to receive the rents, issues, and profits thereof, and to pay or allow to, or permit such overseer or overseers, receiver or receivers, to retain such poundage, or sum or sums of money, by way of salary or wages, as my said trustees or the trustees or trustee for the time being shall think meet or reasonable. And I give the following legacies (4),

Trustees to make leases in the mean time until the estates are sold, upon the same terms as above mentioned in respect to the leases to be made under the power for that purpose to be inserted in the settlement.

To appoint persons to oversee and manage the property, and to receive rents, and to allow them proper salaries.

Pecuniary legacies.

(4) Whenever a legacy is given, and the gift and time of payment are both future, as, if I give to A. B. a legacy of —/ at and when he comes of age, there the time is annexed to the gift and substance of the thing, and if the legatee die before he comes of age, the legacy lapses. 1 Eq. C. Abr. 295. 1 Vez. 48. 3 Atk. 101, 645. 1 Burr. 227. 3 Vez. jun. 135. 12 Vez. jun. 75. Sansbury v. Read, 13 Vez. jun. 108. Hixon v. Oliver. A direction to pay interest upon legatory portions where they are charged upon personalty is always evidence of the vesting, for so it is always held in the Civil and Ecclesiastical Courts, from which the rules respecting legacies and legatory portions are drawn. But it is otherwise where the portion is provided by deed. 2 Vez. 207. Lord Teynham v. Webb, id. 263, Herbert v. Parsons. With respect to all interests arising out of land, the general rule is, without regard to the question, whether the land be the primary or only the secondary and auxiliary fund—or whether the charge be made by deed or

Of the periods of vesting, both as to legacies and legatory portions.

To his wife a
sum for her im-
mediate occa-
sions,

'that is to say,' to my said wife —*l.* for mourning,
and her immediate occasions, and to my other execu-

will—or whether it be a portion, or a general legacy—or for a child or a stranger—or with or without interest—that charges upon land payable at a future day, shall not be raised where the party dies before the day of payment. This is the *general* rule, but there are many exceptions; as where the time of payment is postponed from the circumstances not of the person but of the fund: thus where a legacy is charged on land, to be paid after the death of the testator's wife, there if the legatee die after the death of the testator, and before the death of the wife, the legacy goes to the representatives of the legatee: see 1 Bro. C. R. 124, note; and *Amb'l. 167. Tunstal v. Bracken*. But where a legacy charged on real property is given expressly with a view to the wants and occasions of the legatee at a particular time, as at 21, or marriage, if the legatee die before the time at which, according to the intention of the testator, the legacy would be wanted, it sinks into the land. See the note to the case of *the Duke of Chandos v. Talbot, 2 P. Wms. 612*.

Mr. Cox observes, that where portions have been given out of land, and no time of payment is expressed, the determinations are difficult to be reconciled, some considering them as presently vested, and others that they do not vest, if the legatees die before they want them; see the note last mentioned. But perhaps the cases may be reconciled by adverting to this distinction, viz. that where no time is given, and interest is made payable, they vest immediately; and that where no time is expressed, and interest not given, they do not vest before 21 or marriage: see 2 Eq. C. Abr. 248. Ch. Ca. 181. Rec. in Ch. 318. 3 Atk. 645. It seems that where a legacy is charged on a mixed fund, it sinks into the land if it becomes necessary to resort to that fund, yet if the personal estate is sufficient it vests as to that; 1 Vez. jun. 48. And it seems that where it is charged only on personal estate, directions for maintenance will not make the portion vest; 2 Vez. 207, 262. 1 Burr. 227. 2 P. Wms. 612, note 1. And wherever payment is postponed till 21, though it may vest for some of the above-mentioned reasons, yet the representative cannot claim it until the party, had he lived, would have been 21; 2 Vern. 199. 2 Vent. 342. If the sum itself which is to be paid at a future time is uncertain, it cannot vest in the interim; 1 Vez. 57. *Maddison v. Andrew*. Under words importing a *tenancy in common*, though combined with words of survivorship, the interest in a reversion, being limited so as to vest at the death of the testator, passed to the representatives of one of the legatees, who died between the death of the testator and of the person entitled for life; 7 Vez. jun. 279. And a legacy given at a particular age may vest immediately on the death of testator, by force of the accompanying words, as where a trustee is appointed for the legatee during his minority; 6 Vez. jun.

tors and trustees above-named 100*l.* each, as a small acknowledgment for the trouble they will have in the execution of this my will. And I desire my executors to give mourning and one year's wages, (over and above what may be due for wages) to all such my servants as they in their discretion may think proper. And I give to my said nephew J. A. —*l.* to be paid to him at his age of 21; to D. C. —*l.*; to my nephew L. —*l.*; to my niece E. F. —*l.* at and when she shall arrive at her age of 21, or be married; to my nephew T. D. —*l.* at his age of 21, with

To his executors
for their trouble.

Advance of
wages to ser-
vants.

239. 7 Vez. jun. 421. It can hardly be necessary to observe that the year given to executors does not prevent the vesting; 10 Vez. jun. 13. To prevent a lapse of a legacy, a will should be specially penned; 3 Atk. 572, 582. Thus, where testatrix forgave a debt, and desired her executors to deliver up the bond to the debtor, it was held it did not lapse by his death before testatrix; 1 Vez. 219. 1 P. Wms. 83. And if testator expressly directs that his legacies shall not lapse by the deaths of the legatees in his life-time, and then gives a legacy to B. his executors, and administrators, the legacy will not lapse though B. die in testator's life; 3 Atk. 572. 3 Bro. C. C. 224. And where a legacy is given in consideration of paying an annuity, and the legatee dies in the testator's life-time, the annuity shall be a charge on the residuum, though the legacy lapsed; 1 Vez. 141. Oke v. Heath. If a legacy be given to several persons *jointly*, and one die in the testator's life-time, his legacy will go to the survivor; 2 Vern. 611. Ledsome v. Hickman. But wherever the words 'equally to be divided,' or 'share and share alike' are introduced, the legatees take as tenants in common, and the share of one dying in the life of testator lapses, and of one dying after his death, goes to his representatives; 3 Bro. C. C. 25, 324. 1 Vez. 542. 2 Atk. 221. Ambl. 136. 2 Bro. C. C. 220. 3 Bro. C. C. 455. 3 P. Wms. 115. 2 P. Wms. 347. *id.* 529.

With respect to the abatement of legacies, it may be useful to observe that in case of a deficiency, charity legacies must abate in proportion, and so must legacies given to executors for their trouble; but small gifts to the poor of a parish have been considered as doles, and part of the funeral, and therefore exempt from this liability; but legacies to servants abate. Specific legacies do not abate with the pecuniary legacies, but abate *inter se*. If one makes a will and then a codicil, and gives legacies by both, on a deficiency they shall all come into average, but if one gives legacies, and apprehending there will be a surplus, gives further legacies out of the surplus, by his will or codicil, the legacies first given shall have the preference; 2 P. Wms. 23. Attorney General v. Robins.

interest in the mean time; to R. S. and J. F. —*l.* each, at their several ages of 21; and unto each of my nieces A. J. and J. S. —*l.*; unto E. and A. H. —*l.*; unto J. B. H. B. and C. B. children of my niece D. N. —*l.* each; all the said legacies to be paid to the respective legatees within 12 months after my decease, (save and except those given to my said wife, my said trustees and executors, and my servants, which are to be paid immediately after my death).

Legacy settled.

And I give unto the said Sarah S. the daughter of ———, the sum of —*l.* on the day of her marriage; and I give after her decease the said sum of —*l.* unto such child or children of her the said S. S. as shall attain the age of 21 years, to be divided among them (if more than one) in equal shares, and if but one, the whole to go to such one child as shall attain the said age. The portion or portions of such of them as may attain the said age, in the life-time of the said S. S., to be a vested interest or vested interests, though not payable till after her death, and the interest of the presumptive portions of such of her children as may be under the said age at the time of her death, or so much thereof as shall be thought necessary, to be applied for or towards the maintenance and education of such infant child or children, until he, she, or they shall attain the said age; and the surplus dividends, or interest which may not be applied for that purpose to accumulate and go along with the original share or shares; or in case there shall be no such children who shall attain the said age, such accumulations to fall together with the principal sum into my residuary personal estate. And I give unto J. W. daughter of my said nephew ———, 200*l.* but the same not to be vested in or paid to her till she shall attain the age of 21 years, and not to bear interest in the mean time; I give unto J. R. daughter of ———, 500*l.* but the same not to be vested in or paid to her till the age of 21 years, and not to bear interest in the mean time; I give unto J. B. eldest son of the said E. ———, whom I have hitherto brought

up and^a taken under my protection, —l. over and above what he may participate in the—l. hereinbefore given among the children of the said E. ———, but the same not to be vested (5) in or paid to him till

(5) If a legacy be made payable on a certain day, and nothing is expressed about interest, it is a general rule that the interest shall commence only from the time it is payable, though the legacy may vest from the death of the testator, so as to be transmissible to the legatee's representatives, in case he dies before it is payable; 2 P. Wms. 481, notes. 3 Vez. jun. 10. 4 Vez. jun. 1. But if the legatee die before the time of payment, as if it be made payable to the legatee at 21, and he die before 21, his representative must wait till he would have attained 21 if he had lived, unless it were directed by the will to be paid with interest; 4 Vez. jun. 345. Where no time is appointed for the payment of a legacy, it is not necessarily payable till the expiration of a year after the testator's death, that being the time allowed the executor for getting in the effects, and therefore in such a case interest does not begin to be payable till the year is expired; 2 P. Wms. 26, 27. The old doctrine that the payment of interest should depend upon the funds' being productive or barren, is exploded; and now, although the testator's property consists of stock producing a certain and regular interest, yet if the will is silent about interest none will arise upon a legacy given by him till the end of the year after his death; 7 Vez. jun. 96. But though this is the general rule, it does not apply where the legatee is the child of the testator, for in such a case the Court will order interest to commence immediately, since a parent is bound by the law of nature to provide a present maintenance for his own child; 3 Vez. jun. 13. 3 Atk. 60, 102; and it seems it was Alvanley's opinion, when Master of the Rolls, that illegitimate children were to be admitted to the same benefit; 3 Vez. jun. 12; though Lord Hardwicke held a contrary opinion, on the principle of law, which recognizes no relationship in such a child; 1 Vez. 310. And Lord Eldon seemed to think that there ought to be something to shew that the testator means to put himself in loco parentis. 6 Vez. jun. Perry v. Whitehead, and see 4 Vez. jun. De Mazar v. Pybus. Lord Alvanley was also of opinion that a grandchild was to be comprized within the exception out of the above-mentioned general rule, and was to be put upon the same footing with a child in this respect; 3 Vez. jun. 12. And the Court of Chancery has in subsequent cases confirmed that opinion; 5 Vez. jun. 194. But this favour does not extend to a nephew; 3 Vez. jun. 12. Where a legacy is left to an infant, payable at 21, and bequeathed over on his dying before that age, and his death happens before his arriving at that age, the accumulated interest shall go to the representative of the deceased, and not to the remainder man; 2 P. Wms. 421, note 1. 1 Bro. C. R. 82, 335. 3 Atk. 59. Where a father is living and able to maintain his child to whom a legacy is bequeathed,

his age of 21 years, and not to bear interest in the mean time ; and unto such child or children of my

it has been held that the interest of the legacy shall not be applied to his maintenance during his nonage ; 3 Atk. 60, 399. But where the father is incompetent to maintain his child, he shall be maintained out of the interest of his legacy, whether it be vested or contingent, and although the legacy be bequeathed over on the infant's dying before 21 ; 3 Atk. 60. 2 P. Wms. 21. Where a father provides any maintenance for a child, however small, and however large the legacy, the inference in favour of interest is repelled. See Cas. temp. Lord Redesdale, *Ellis v. Ellis*, and note. Where the occasion is very pressing, the Court will sometimes break in upon the principal, but this is seldom and cautiously done ; 4 Bac. Abr. 433. 3 Bro. C. R. 178. 2 P. Wms. 21. 1 Vern. 255. and it seems this can on no account be done if the legacy be devised over on the infant's dying before he comes of age ; 4 Bac. Abr. 442. Whether legacies are charged on real or personal estate, it is become the established practice of the Court to allow only 4 per cent. where no interest is directed by the will ; 4 Bac. Abr. 440. 2 Bro. C. R. 47. 3 Bro. C. R. 53.

If an annuity be given by a will without specification as to the times of payment, it shall commence in computation from the testator's death, and consequently the first payment shall be made at the expiration of the year after that event ; but if a sum be directed to be placed out to produce an annuity, whether that is to be considered as a legacy payable at the end of the year, and to begin in computation only from that time, or as an annuity commencing from the testator's death, seems not to be fully settled ; 7 Vez. jun. 96.

An executor used often to be embarrassed how to dispose of a legacy bequeathed to a minor. He runs a risk in paying it to the father, or any other relation of the infant, without the sanction of a Court of Equity ; 4 Bac. Abr. 429. 1 Equ. C. Abr. 300. 3 Bro. C. R. 96, 186. 4 Burn. Eccl. C. 321. But by the Act of 36 Geo. 3. c. 52. s. 32. it is enacted, that where by reason of the infancy of any legatee, the executor cannot pay the legacy, it shall be lawful for him to pay such legacy, after deducting the duty payable thereon, into the Bank of England, with the privity of the Accountant General of the Court of Chancery, to be placed to the account of the legatee, for payment of which the Accountant General shall give his certificate, on the production of the certificate of the Commissioners of Stamps, that the duty thereon has been duly paid ; and such payment into the Bank shall be a sufficient discharge for such legacy ; and when paid it shall be laid out by the Accountant General in the purchase of 3 per cent. consolidated annuities ; which with the dividends thereon shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the Court of Chancery by petition, or motion in a summary way. But the executor is not bound to pay the legacy into the Bank till the expiration of a year after the testator's death.

said nephew I. J., (born in his life-time or after his death) as shall attain the age of 21 years, the sum of —l. to be divided between or among them, if more than one, share and share alike, and if but one then the whole to such one child as shall attain such age, and not to bear interest in the mean-time. And after the decease of my said neice I. M., I give unto such child or children of her, now in being or hereafter to be born, as shall live to attain the said age of 21 years, the sum of —l. the same to be divided between or among them (if more than one), share and share alike, and if but one then the whole to such one child as shall attain the said age, and not to bear interest in the mean-time, but the portions of such of them as shall attain the age of 21 years in his life-time, shall be vested interests, though not payable until after her death, and after the decease of my said niece I. M. I give the sum of —l. to such child or children of her now in being, or hereafter to be born, as shall attain the age of 21 years, the same to be divided between or among them if more than one, share and share alike; and if but one, the whole to such one child as shall attain the said age, and not to bear interest in the mean-time; but the portions of such of them as shall attain the said age in her life-time, shall be vested interests, though not payable till after her death. And I give after the decease of the said E., unto such child or children of him the said E., born in his life-time, or after his decease as shall attain the age of 21 years, —l. the same to be divided among them, if more than one, in equal shares, and if but one, the whole to go to such one child as shall attain the said age, and not to bear interest; save that in case of the death of the said E., having a child or children under the age of 21 years, my will is that my said trustees or trustee for the time being shall and may pay and apply any sum not exceeding the sum of 50l. per annum, by equal quarterly payments, for and towards the maintenance and education of such infant child or children, until

he, she, or they shall attain the age of 21 years. And I will that the portions of such children of the said E. as shall attain the said age of 21 years in his life-time, shall be vested interests, though not payable till after his death. And as a further provision for the said E. B., whom I have hitherto brought up and taken under my protection, I empower my said trustees or trustee for the time being, to apply such sum and sums of money (not exceeding —l. in the whole) for placing out the said E. B., apprentice to some profession or trade as they the said trustees or trustee shall think proper, recommending to his choice the profession of ———, when and so soon as he shall arrive at a proper age for that purpose. And I declare that such sum or sums as may be thought fit to be applied for that purpose, shall be considered as falling under the class of my pecuniary legacies. And I give and bequeath unto my said trustees and executors, the exchequer annuity of —l. which I purchased for the life of my said niece I. M. my nominee, in trust, to pay and apply the same as she my said neice, notwithstanding her present or future coverture, shall by any note or writing under her hand, direct or appoint, and in default, at any time, of such direction or appointment, then shall and do pay the same into her proper hands, for her own sole and separate use and benefit, to the intent that the same annuity or any part thereof may not be subject to the debts, power, or control of her present or any future husband; and I declare that the receipt or receipts of her, or of the person or persons to whom she may direct the same to be paid, shall from time to time, notwithstanding her coverture, be a sufficient discharge or discharges for the said annuity, or so much thereof as in such receipt or receipts shall be acknowledged or expressed to be received. And I release to ———, the debt secured to me by his bond, and a judgment thereon, and desire my executors to deliver to him the said bond to

be cancelled, and to acknowledge satisfaction on the judgment at his costs. And I give all the goods and fixtures belonging to me, and now at or upon my farms and lands in ———, in the occupation of ———, unto ———, to and for his own use, without any account to be rendered by him to my executors in respect thereof, which bequest together with the legacy of ——— herein before given to him, I consider as sufficient, having heretofore amply advanced him. And I give and bequeath all the rest and residue of my personal estate and effects, of what nature or kind soever the same may be, unto my said trustees, their heirs, executors, administrators, and assigns, upon trust, that my said trustees or the trustees or trustee for the time being, do and shall invest the same in the purchase of manors, messuages, lands, tenements or hereditaments, of a clear and indefeasible estate of inheritance in fee-simple in possession, to be situate or arising somewhere in that part of Great Britain called England; and do and shall convey, settle, and assure such manors, messuages, lands, tenements, or hereditaments, as may be so purchased, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under and subject to such and the same powers, provisos, limitations and declarations, as are hereinbefore directed to be limited, expressed or declared, in and by such settlement as aforesaid of and concerning such of the freehold manors, and hereditaments devised by this my will, as are intended to be comprized in the same settlement, or such and so many of them as shall be then subsisting, undetermined or capable of taking effect. Provided, and my will is, that it shall be lawful for my said trustees, or the trustees or trustee for the time being to place out my residuary personal estate, in the mean time, and from time to time, until a convenient purchase or purchases of lands or hereditaments can be found, in the public funds, or upon

Residue of the personal estate to be laid out in the purchase of other estates to be settled as before directed concerning the before devised estates.

The same to be placed out in the funds until convenient purchases can be made, with power to vary and transpose the securities.

The interest and dividends to go as the rents of the purchased estates would go if purchased.

Power for change and substitution of the trustees under the will.

government or real securities at interest, in their, his, or her names or name, and when and as often as it may be thought prudent or proper to call in the principal money so placed out, or to sell and transfer such funds or securities, and to reinvest the principal money so called in or arising by such sale or transfer, in or upon any new or other funds or securities of the like kind, and so from time to time to vary, alter or transpose all such funds or securities for others of the same nature, so often as it may be thought meet. And my will is, that the dividends and interest arising from all such principal money, funds and securities, shall from time to time go and be paid to such person or persons, and be applied for such intents and purposes as the rents and profits of the lands, or hereditaments, to be purchased therewith, and settled as aforesaid, would go or be payable or applicable unto, in case such purchase and settlement were actually made. Provided, and my will further is, that when and so often as any of them the said, &c. my said trustees hereby appointed, or any succeeding trustee or trustees, (whether introduced into the trusts of this my will or any of them, by nomination or appointment under this present power or by representation of any deceased trustee or trustees), shall die, or refuse, or neglect to act, or be desirous to be discharged from, or become incapable of acting in the execution of the said trusts, or any of them, it shall and may be lawful for the surviving or other trustees or trustee for the time being, whether introduced into such trusts by nomination or appointment, or by representation as aforesaid, by any deed or writing, deeds or writings, under his, her, or their hand and seal, or hands and seals, attested by two or more credible witnesses, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes herein mentioned, or any of them, in the stead of such trustee or trustees so dying, or refusing, or neglecting to act, or being desirous to be discharged

as aforesaid. And the said trust estates, whether real or personal, shall upon, or so soon as conveniently may be after every such nomination or appointment, be conveyed, assigned, and transferred, so as that the same may be vested in such new trustee or trustees, (if any) their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively. And if there shall be no continuing trustee, then wholly in such new trustee or trustees as the case may happen; and his or their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, and declarations expressed or declared concerning the same respectively by this my will, or such and so many of them as shall be then subsisting or capable of taking effect; and every such new trustee, his heirs, executors, administrators, and assigns, shall have, and be invested with every power and authority hereby delegated to the trustees herein named, either alone or in conjunction with such former trustees or trustee, as the case shall be. Provided also, that my said trustees respectively, for the time being, shall be charged, and chargeable only with such monies as they respectively shall have actually received, and that one of them shall not be answerable or accountable for the other, or for the acts, receipts, neglects, or defaults of the other of them, but each only for his, her, or their own acts, receipts, neglects, or defaults, neither shall they my said trustees for the time being, be answerable or accountable for any misfortune, loss or damage that may happen, of or to the said trust estates, monies, and premises, or any part thereof, except the same shall happen by or through his, her, or their wilful default respectively. And also that my said trustees for the time being, and each of them, their and each of their heirs, executors, administrators, and assigns, shall and may

by and out of the monies that shall come to their respective hands by virtue of the trusts aforesaid, retain to and reimburse herself, himself, and themselves respectively, and allow to his, her, or their co-trustee or co-trustees, all such costs, charges and expences as they, either or any of them shall or may respectively sustain, expend, disburse, or be put unto, in or about the execution of the trusts hereby in them reposed, or in any wise relating thereto. And I appoint ———, ——— and ———, executrix and executors of this my will. And I also appoint them, and the survivor and survivors of them, guardian and guardians of such child or children as I may have, whether born in my life, or after my decease, during their respective minorities. And I revoke all former and other wills by me at any time heretofore made, and declare this only to be my last will and testament,

In witness, &c.

A Merchant's Will, providing for the continuance of his Trade under the Management of his Executors for the Benefit of his Family, and for the future Introduction of his Sons into the Business.

THIS is the last will and testament of me, ——— of ———. I direct that my executors hereinafter named, do and shall within one month

after my interment, cause a full, true, and accurate inventory schedule and account to be made and taken of all and singular my estate and effects of every nature or kind whatsoever, whether real or personal, and that five fair copies thereof shall be transcribed and signed by all my said executors, and that one of the said copies so signed as aforesaid shall be delivered to each of my said executors, for his own use. And I will and direct that all such debts and sums of money as I shall justly owe at the time of my decease, together with the expences of my funeral, and the probate of this my will, and the execution thereof, be fully paid and satisfied by my said executors out of my personal estate. I give and bequeath to my dear wife S. T., the sum of 100*l.* to be paid to her immediately after my decease; and to each of my children who shall be then living, the sum of 20*l.* to be applied by their mother, for their use in mourning and necessities, immediately after my decease.

Executors within a month after testator's interment to make an inventory of all his estate and effects.

Debts and funeral and testamentary charges to be paid out of the personal estate.

I give and bequeath unto my said wife S. T., over and above the estates which are already settled upon her, (situate, &c.) one annuity or yearly sum of 400*l.* for and during the term of her natural life, in case she shall so long continue my widow; and I do hereby direct that the same shall be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from or by the capital to be employed in my trade or business of ———, which is to be carried on by my said executors, according to the directions hereinafter for that purpose given and contained. And that the said annuity or yearly sum of 400*l.* shall be paid to her my said wife, by four equal quarterly payments, on Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year, the first payment thereof to begin and be made on such of the said days as

Annuity to the wife, durante viduitate, over and above the settled provision.

In case of her second marriage the annuity to be reduced and paid to her separate use.

shall next happen after my decease. - But in case my said wife shall marry again at any time after my decease, then and in such case, I revoke the said bequest of the said annuity of 400*l.* hereinbefore given to her, and direct that the same shall from thenceforth cease and determine; and instead thereof, I give and bequeath unto ——— and ———, one annuity or yearly sum of 300*l.* for and during the remainder of the natural life of my said wife, subject nevertheless to the proviso hereinafter contained for determining the same, to be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from the capital employed in my said trade or business, and to be payable at or upon the like four equal quarterly days of payment as aforesaid, that is to say, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year. And the first payment of the said annuity of 300*l.* to begin and be made on such of the said days as shall first and next happen after such second marriage of my said wife, upon trust, nevertheless, that they the said (trustees) or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall pay the said last-mentioned annuity of 300 *l.* from time to time, as and when the same shall become due and payable and be received by them as aforesaid, unto my said wife S. T., in the manner hereinafter expressed.

And I hereby expressly will, direct and declare, that the said annuity or yearly sum of 300*l.* or any part thereof, shall not be subject or in any manner liable to the debts, control, engagements, or intermeddling of any husband with whom my said wife shall hereafter happen to intermarry, but that the same shall from time to time be paid into her hands, to and for her own sole separate and peculiar use and benefit, and not into the hands of any other

person or persons whomsoever. And that the receipt and receipts of my said wife under her hand alone, notwithstanding her coverture, shall from time to time be a good and sufficient discharge, and good and sufficient discharges, to my said trustees, for so much of the said last mentioned annuity as in such receipt or receipts shall be acknowledged or expressed to have been received, (Proviso for restraining her from assigning the annuity, see page 534).

And my will is, that it shall and may be lawful to and for my said wife in case she shall continue my widow until the time of her decease, (but not otherwise) in and by her last will and testament in writing, to be by her signed and published in the presence of and attested by two or more credible witnesses, to give, bequeath and dispose of the sum of 5000*l.* to be charged and chargeable upon, and raised and paid out of the residue of my personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit. But in case my said wife shall marry again at any time after my decease, and she shall not at any time during her life have forfeited the said annuity of 300*l.*, under the proviso hereinbefore for that purpose contained, then and in such case, but not otherwise, it shall and may be lawful to and for my said wife, by her last will and testament to be executed and attested in such manner as aforesaid, to give, bequeath, and dispose of the sum of 2000*l.*, only, to be in like manner charged and chargeable upon, and raised and paid out of the residue of my said personal estate, unto such person or persons, in such parts, shares, and proportions, and in such manner and form as she shall think fit; and I do hereby charge and make chargeable the residue of my personal estate and effects, with the payment of the said sum of 5000*l.* to the legatee or

Power to the wife to dispose by will of 5000*l.* to be paid out of the residue of the personal estate; to be reduced to 2000*l.* upon her marrying again.

legatees thereof, to be named in the last will and testament of my said wife, in case she shall continue my widow until the time of her decease, or in case of her marrying again, then with the payment of the said sum of 2000 l. to the legatee or legatees thereof accordingly.

Power to the wife
to reside in the
dwelling-house.

And my will is, that my said wife shall and may reside in the house wherein I now dwell, situate at ———— aforesaid, in case she shall think proper so to do, and shall and may have and enjoy the use of all my furniture, plate, linen, china, and glass, which shall be therein at the time of my decease, for and during her life, if she shall so long continue my widow and unmarried, but not otherwise. And in case she shall think proper to quit the said house at any time after my decease, then I give and bequeath unto her my said wife, the sum of 500 l. in order to settle her in and furnish for her any other habitation she may choose to reside in.

Annual sums to
be applied out of
the interest of
the capital of the
business for the
maintenance of
testator's daugh-
ters, varying
with their ages.

And it is my will and mind, and I do hereby direct that the sum of — l. per annum, shall be allowed and paid out of the interest to arise, and accrue, as hereinafter is mentioned, from or by the capital to be employed in my said trade or business of ———, to be carried on by my said executors as hereinafter mentioned, for the maintenance and education of each of my daughters E., S., and M.; and also the like sum of — l. per annum, for the maintenance and education of each and every other daughter I may hereafter have, until my said daughters E., S. and M., and my said other daughters shall respectively attain the said age of 12 years. And that from and after their respectively attaining the age of 12 years, the sum of 100 l. per annum, shall be allowed and paid out of the said interest to arise or accrue as aforesaid, for the maintenance and education of each and every of my said daughters, until they

respectively shall attain the age of 21 years, in case they shall so long continue sole and unmarried, but not otherwise.

And my will is, and I do hereby direct that the said (trustees) or the survivors and survivor of them, or the executors or administrators of such survivor, do and shall as and when each of them my said daughters E., S. and M., and as and when each and every such other daughter as I may hereafter have, shall respectively attain the age of 21 years, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, by and out of my personal estate, lay out and invest the sum of 5000*l.* in the purchase of an equivalent share or shares of the parliamentary stocks or funds of Great Britain, in their, his or her own names or name, and that they the said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor do and shall stand and be possessed of and interested in the stocks, funds, or securities, so to be purchased as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter expressed and declared of and concerning the same, (that is to say) upon trust to pay to, or otherwise sufficiently authorize and empower every such daughter so attaining the said age of 21 years, to have, receive, and take the interest, dividends, and annual produce of the stocks, funds, or securities so to be purchased with one of the said sums of 5000*l.* during her life, for her own, sole, separate and peculiar use and benefit, and so as the same or any part thereof shall not be subject or in any manner liable to the debts, control, engagements, or intermeddling of any husband whom such daughter may happen to marry. And my will is, and I do hereby expressly direct and declare that the receipt and receipts of every such daughter under her hand shall, notwithstanding her coverture, be a good and

To invest 5000*l.* as each daughter comes of age, and to pay the interest to her for life, to her separate use.

sufficient discharge to my said trustees or trustee for the time being, for so much of the said dividends, interest, or annual produce, as in such receipt or receipts shall be acknowledged or expressed to have been received.

Proviso against
assigning or
anticipating.

Provided always, and I do hereby declare my will and mind to be, that it shall not be lawful for my said daughters respectively to charge, sell, assign, or otherwise dispose, by way of anticipation, of the interest, dividends, and annual produce so to them respectively payable as aforesaid, and that notwithstanding such charge, sale, assignment, or other disposition, it may and shall be lawful to and for my said trustees or the trustees or trustee for the time being, and they, he and she is and are hereby required, to pay the said interest, dividends, and annual produce, into the proper hands of my said daughters respectively, for their respective, separate, and peculiar use and benefit upon their own respective receipts. And my will is, and I do hereby direct, that from and after the decease of every such daughter of my body, they my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of, and interested in the said stocks, funds, or securities so to be purchased with the said sum of 5000*l*. the interest, dividends, and annual produce whereof are hereinbefore directed to be paid for life to such daughter so dying as aforesaid, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, that is to say, in trust for all and every or such one or more exclusively of the children of such my daughter, or in trust for all and every or such one or more exclusively of the issue, born in the life-time of such my daughter, of any such child or children, or both, in such manner, with such provi-

To and among
the children of
daughters, and
the issue of such
children born in
the life-time of
the daughter, as
the daughter
shall appoint.

sions for their respective maintenance or education, and if more than one such child or issue, in such shares and proportions as such my daughter respectively by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or by her last will and testament to be by her signed and published as aforesaid, shall from time to time direct or appoint. And in default of appointment of the same, under the power hereinbefore contained, or so far as such appointment shall not extend, and subject to the trusts hereinbefore declared of the same, upon trust for all and every the child and children of such my daughter, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with such consent as aforesaid, equally to be divided between or amongst them, if more than one, share and share alike, and if but one such child then for such one child.

And my further will is, and I do hereby direct, that in default of appointment respectively as aforesaid, after every such my respective daughter's decease, the dividends and interest, and annual produce of the stocks, funds, or securities on which the said £000^l. shall have been invested, to the dividends, interest, and annual produce of which such daughter shall have been entitled, or so much as shall be thought necessary by my said trustees or the trustees or trustee for the time being, of the said dividends, interest, and annual produce, shall be applied in, for, and towards the maintenance and education of such her child or children during his, her, or their respective minorities: and the residue thereof shall be invested in or upon such securities as aforesaid, and accumulated in the way of compound interest; and that such accumulations shall be in trust for the persons who, under the trusts hereinbefore or hereinafter declared,

Education and maintenance out of the interest of the respective portions.

shall become absolutely entitled to the funds whence such accumulations shall have proceeded.

And if no child of any of his daughters shall live to attain 21, then to such persons as the daughter shall appoint.

And in default of appointment to go to and among his widow and children, in case his widow shall not have married again, and if she shall have married again, then among the children only.

And in case any such my daughter shall have no child, who being a son shall attain the age of 21 years, or daughter who shall attain that age, or marry with such consent as aforesaid, then and in such case, and in default of appointment respectively as aforesaid, in trust, that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the said stocks, funds, and securities, the interest, dividends, and annual produce whereof is hereinbefore directed to be paid to such my daughter for her life as aforesaid, in trust, for such person or persons, in such shares and proportions, and in such manner and form, as such daughter shall by any deed or deeds, or instrument or instruments, in writing, to be by her sealed and delivered, or in and by her last will and testament in writing, to be by her executed and attested in such manner as aforesaid, direct, limit, or appoint; and for want of such direction, limitation, or appointment, and as to so much or such part thereof whereof no such direction, limitation, or appointment shall be made, upon trust, for my said wife, if she shall be then living and shall have continued my widow, and all and every my children now born or hereafter to be born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with the consent of my trustees or trustee for the time being, or the major part or equal number of them, to be divided between or amongst my said widow and children, share and share alike; but in case my said wife shall be then dead, or shall not till then have continued my widow, upon trust, for all and every my children now born or hereafter to be

born, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age, or marry with such consent as aforesaid, to be divided between or among them, if more than one, share and share alike, and if but one such child, then the whole to be in trust for that one child, and if I shall have no child, then the whole to be in trust for my wife, if living and having continued my widow as aforesaid.

And my will is, and I do hereby direct, that the sum of 70*l.* per annum shall be allowed and paid out of the interest to arise or accrue as hereinafter is mentioned, from or by the capital employed in my said trade or business to be carried on by my said executors as hereinafter is mentioned, for the maintenance and education of each of my sons now born or hereafter to be born, until they shall respectively attain the age of 12 years, and from and after their respectively attaining that age that the sum of 100*l.* per annum shall be allowed and paid, out of the interest to arise or accrue as aforesaid, for the maintenance and education of each of my said sons now born or hereafter to be born, until they shall respectively attain the age of 21 years.

An annual sum to be applied out of the interest of the capital to be employed in the business, to and for the maintenance and education of testator's sons, to vary in amount with their ages.

And whereas I think it will be advantageous to my sons that the trade or business, which I now carry on at ——— aforesaid, shall be continued after my decease, and preserved for them or such of them as may choose to carry on the same, when they shall attain a proper age; and I am therefore desirous of giving my trustees hereinafter named full power to continue and carry on the same in such manner as is hereinafter mentioned: now I do, for that purpose, give and bequeath all my capital and stock in trade, and all my cash, debts, and effects which shall be employed in or belonging to the said trade or business at the time of my decease, unto

Testator's trade to be carried on by his executors.

To be carried on by the executors till the youngest son shall have attained 21.

The executors to have an annual sum for their trouble.

Executors to make up a full account of all the stock and cash employed in the trade, and of the debts due to or from the same, and to have all the property in the trade valued, that the amount of the net capital may appear.

my said wife and the said trustees, their executors, administrators, and assigns, upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared concerning the same, (that is to say) upon trust, that they my said wife and the said (trustees), and the survivors and survivor of them, and the executors or administrators of such survivor, may and shall carry on the said trade or business of a ———, for the term or time, and in manner hereinafter-mentioned, (that is to say) if all my sons W., F., T., and G. shall attain the age of 21 years, then until the youngest of my said sons shall attain the age of 21 years; but if all of them shall not live to attain the age of 21 years, then until the last of them attaining the age of 21 years shall actually attain that age, or for such further or longer period as may be necessary for the purpose of performing the trusts hereby in them reposed of or concerning the said trade or business. And I give and bequeath unto such of them the said (trustees) as shall prove this my will, and act in the execution of the trusts thereof, but not otherwise, for his trouble therein, the annual sum of ———l. to commence and be computed from the time of my decease, and continue until my second son for the time being shall attain the age of 22 years, the same to be paid annually, and after the same rate for any less time than a year that shall happen of the period between the time of my decease, and such my second son's attaining the age of 22 years as aforesaid. And my will is, and I do hereby direct, that they my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, immediately after my decease, cause a full, true, and just account in writing to be made and taken of all the capital stock, and cash employed in the trade aforesaid, and all the debts and things which shall be then belonging, due, and owing to the said trade,

and of all such debts as shall be due or owing from or by the said trade to any person or persons; and do and shall cause a just valuation and appraisement to be made of all the particulars in the said account, in order that the net amount of the capital then employed in the said trade may clearly appear; and that my said trustees, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall, on ————— next after my decease, or within one calendar month then next following, and so yearly and every year whilst the said trade shall be carried on by them, in pursuance of the powers herein for that purpose contained, on the same day, or within one calendar month next afterwards, cause to be made up and stated a full and accurate account, statement, and adjustment of the accounts of the said trade, and shall and do cause to be made and taken a like account, in writing, of all the stock, monies, debts, and other things which shall be then belonging, due, or owing to the said trade, and of all such debts as shall be due or owing from or by the said trade to any person or persons whomsoever, and do and shall cause a just valuation and appraisement to be made of all the particulars included in such account; and that the profits and gains which shall arise or be made from or by the said trade, shall in the first place be liable to answer interest after the rate of 5 l. per cent. per annum, upon the net amount of the capital in cash and effects, which shall be from time to time employed in the said trade, including the debts owing to the trade, of which interest a distinct account shall be kept; and out of such interest my said wife shall have, receive, and be paid the annuity hereinbefore given to her, or in trust for her as aforesaid, and the said several sums hereinbefore directed to be allowed and paid, for the maintenance and education of my said sons and daughters respectively, shall be

And to make out a yearly account.

The profits of the trade in the first place to answer the interest of 5 l. per cent. per ann. upon the net amount of the capital employed.

The annuity to the wife, and the several sums before directed to be allowed and paid, to come out of this interest.

And subject to such trusts, to invest the residue of such interest in the funds or government securities, to accumulate in the way of compound interest, until divided amongst the sons.

This division to be in equal shares, one moiety to be paid as they respectively arrive at the age of 21, and the other moiety, with the intermediate accumulations, as they arrive at the age of 25.

The overplus of the profits, after answering such interest upon the capital, to be added to the capital employed in the business.

Shares of the sons to survive.

allowed, deducted, and paid; and subject thereto respectively, the said interest shall, from time to time, be laid out in, or invested upon, the parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be from time to time altered and varied at the discretion of my said trustees, or the trustees or trustee for the time being, so that the same and the resulting income and produce thereof may be accumulated in the way of compound interest, until the same shall be divided amongst my sons, as well those already born as those hereafter to be born, in the manner next hereinafter mentioned, (that is to say) the same shall be divided into as many shares as I shall have sons already born or hereafter to be born, and when each of my said sons shall attain the age of 21 years he shall have and be entitled to one of such shares, and the same shall be paid to him as follows, (that is to say) one moiety or half part of such share immediately on his attaining the age of 21 years, and the other moiety or half part of such share, together with the intermediate accumulations of such moiety, on his attaining the age of 25 years; and each of such my said sons shall, from and after his attaining his age of 21 years, also have and receive a proportionable part or share of the interest to arise or accrue on the said capital, after payment of the said annuity to his mother, and the several sums hereinbefore directed to be allowed and paid thereout as aforesaid. And I do hereby declare my will and mind to be, that the overplus of the said profits and gains, after answering interest upon the said capital as aforesaid, shall from time to time be added to the said capital, and shall be therewith employed in carrying on the said trade or business as hereinbefore directed.

Provided always, that in case any of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall hap-

pen, the part or share of such son so dying, of and in the money so directed to be raised for interest, and so to be invested and accumulated as aforesaid, and also the future interest to accrue for the same, shall be paid to and amongst the survivors or others of them, if more than one, share and share alike, and if more than one of my said sons shall depart this life under the age of 21 years, then and in such case, and so often as the same shall happen, the surviving or accruing share or shares to which such son or sons would, on attaining the age of 21 years, have become entitled under the clause last hereinbefore mentioned, shall again survive and accrue to the survivors or survivor, or others or other of them my said sons, in equal shares and proportions if more than one, and in case all of them save one shall happen to die under the age of 21 years, then as well the whole of the interest so to be invested and accumulated as the whole of such future interest, to belong to such one or only son, and to be an interest vested in him on his attaining the age of 21 years, and to be paid to him at the respective times and in manner aforesaid. And my will is, that when my said son W. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth of the profits and gains which, after answering such interest as aforesaid while the same shall continue payable, may or shall arise or be made in the said trade after his admission as such partner therein; and my will also is, that when my son F. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part of the profits and gain which, after answering the said interest, shall arise or be made in the said trade

Each son attaining 21 to be admitted a partner, and to be intitled to a fourth.

after his admission as a partner therein; and my further will is, and I do hereby declare, that when my son T. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case have and be entitled, during the partnership, to one-fourth part or share of the profits and gains, which, after answering the said interest, shall arise or be made in the said trade after his admission as a partner therein; and further my will is, that when my son G. shall attain the age of 21 years he shall become and be admitted a partner in the said trade, if he shall think proper, and shall in such case be entitled, during the partnership, to one-fourth part of the profits and gains which shall, after answering the said interest, arise after his admission as a partner therein.

The sons to make their election as they come of age, to enter into the business or not.

And my will is, and I do hereby direct, that all my said sons shall, within the space of one year next after they shall respectively attain the age of 21 years, determine and elect whether they will become partners in the said trade or not, and in case they determine and elect to become partners therein, they shall within that time respectively notify such their election and determination, by writing, under their respective hands, to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or otherwise they shall be considered as having refused to become partners therein.

Proviso empowering the trustees to remove from the business any son, whose conduct proves him to be unqualified.

Provided always, and my will is, that in case my trustees, or trustee for the time being, or the major part of them, shall, from the conduct of any or either of my sons who shall become and be a partner or partners as aforesaid, while any of the trusts of this my will, respecting the said trade, shall remain unperformed, be of opinion that it will be injurious

to the trade then carried on, and to the rest of the partners therein, that such son or sons should any longer continue a partner or partners in the said trade, that then and in such case it shall be lawful to and for my said trustees, or the trustees or trustee for the time being, or the major part of them, and he and they shall have full power and authority immediately to dissolve the partnership, so far as respects such son or sons, and such son or sons shall thenceforth be no longer a partner or partners in the said trade, and from and after such dissolution of the said partnership, or dismission therefrom, have and be entitled to such legacy and legacies and provision, as is hereinafter made for such of my said sons as shall neglect or refuse to become a partner or partners in the said trade or business, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

And such son so excluded or refusing, shall have the legacy and provision after-mentioned;

And my further will is, and I do hereby direct, that in case any of my said sons W., F., T., and G. shall refuse to become partners or a partner in the said trade, within the time aforesaid, then every of such sons so refusing to become a partner in the said trade shall, upon his attaining the age of 22 years, (but not unless he attains that age) have and receive, from and out of the capital then employed therein, the sum of 4000*l.* to and for his and their own use and benefit; and every of such sons shall, nevertheless, be entitled to, and shall have and receive, his original share of the interest which shall have arisen or accrued from or by the said capital employed in the said trade, up to the time of his attaining the age of 21 years, the same to be paid and payable at the time and in the manner hereinbefore mentioned, but shall not be entitled to any further part or share thereof, by way of survivorship or accruer, on the death of any other or others of my said sons.

Such son to have a legacy of 4000*l.* and his original but not accruing share in the interest of 5 per cent. upon the capital aforesaid.

All the profits and gains of the business, after answering the objects aforesaid, to belong to the survivors of those dying under 21 continuing in the business, and to such as elect to be in and continue in the business, exclusively of those who refuse or withdraw.

If only one son shall elect to be in the business, he is to pay one sixteenth of the profits to the others refusing until their attaining — years, or dying, provided they do not carry on the same trade within the weekly bills of mortality.

And I also declare my will and mind to be, that in case any of my said sons W., F., T., and G. shall depart this life under the age of 21 years, or shall refuse to become a partner in the said trade within the time aforesaid, or withdraw himself therefrom after his admission as a partner therein, then and in such case the survivors and survivor of them my said sons W., F., T., and G., who shall elect to become such partner or partners in the said trade, in the manner and upon the terms aforesaid, shall have and be entitled in equal shares and proportions, to the whole of the share or shares to which such son or sons, so dying under the age of 21 years, or declining to become a partner or partners in the said trade, or withdrawing himself therefrom, would either originally or by survivorship or accruer have been entitled, of the profits and gains which, after deducting such interests as aforesaid, shall arise or be made in the said trade or business, after their respective admission as partners therein. And in case all my said sons but one shall happen to depart this life under the age of 21 years, or shall refuse to become partners in the said trade, then and in such case, such one son who shall elect to come into the said trade in order to carry on the same in partnership as aforesaid, shall have and be entitled to the whole of the profits and gains which shall arise or be made in the said trade, after his admission to the same, (after answering and paying thereout interest upon the net amount of the capital employed in the said trade and also paying unto such of his brothers as shall refuse or decline to carry on the said trade in partnership, or shall withdraw himself from the said trade after his admission as a partner therein, one-sixteenth part of such profits and gains, until such brother shall attain the age of — years, or depart this life, provided such brother shall not carry on the same trade within the weekly bills of mortality as hereinafter is mentioned;) and such one son who shall elect to come into the

Provisions for continuance of Testator's Trade.

659

said trade in order to carry on the same in partnership, and shall continue therein, shall and may thenceforth, and subject as aforesaid, carry on the said trade to and for his own use and benefit. And my will is, and I do hereby direct, that the firm or Future stile or firm of the partnership. stile by which the said trade shall be carried on, until one or more of my said sons shall be admitted therein, shall be "————," and after the admission of one or more of my said sons therein the same shall be "———— and Son," or "———— and Sons," as the case may be.

And my will is, and I do hereby direct, that in case all or any of my said sons shall refuse or decline (within the respective times before limited) to carry on the said trade or business in partnership, upon the terms and in the manner hereinbefore mentioned, then I do hereby direct, that every such son, so refusing or declining to carry on the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits or gains thereof, until they shall respectively attain the age of — years, or depart this life, which shall first happen; and in case any of my said sons, who shall become a partner or partners in the said trade or business, shall at any time after his or their admission into the same, and before his or their attaining the age of — years, be desirous of withdrawing himself or themselves therefrom, then and in such case such son or sons, so withdrawing himself or themselves from the said trade or business, shall have and be entitled to one-sixteenth part or share of the clear profits and gains thereof, until he or they shall attain the age of — years, or depart this life, which shall first happen. If all refuse or withdraw, they are to have each one-sixteenth till of the age aforesaid, or dead.

Provided always, that no such son or sons, so refusing, declining, or withdrawing himself or themselves, shall afterwards carry on the same trade within the weekly bills of mortality; but in case such The sixteenth share to cease, upon any of them carrying on the same trade within the bills of mortality.

son or sons, so refusing, declining, or withdrawing as aforesaid, shall carry on or be concerned in the same trade within the bills of mortality, then and from thenceforth the said one-sixteenth part or share, so directed to be paid to him, shall cease and determine, and he or they shall not, at any time thereafter, have or be entitled to any share of the profits and gains of the said trade or business to be carried on by the other son or sons, in pursuance of this my will.

When all the children, being in the partnership, shall have reached 28, or be dead under that age, whilst in partnership, the trustees are to make up a general account of all the effects, and invest 20,000*l.* in the funds, and then distribute the residue into double the number of shares that there are children living to 28 years in the partnership, or dying in the partnership and leaving widows and children, and to give one share to the family of each son so dying under 28, in the business, and the remaining shares equally among those who have lived to attain 28, in the partnership business.

And my will is, and I do hereby direct, that when all my said sons W., F., T., and G. shall have attained the age of 28 years, in case they shall all of them have elected to become partners in the said trade, and none of them shall have withdrawn himself from the same, or in case any of my said sons shall have declined or refused to become partners or a partner in the said trade, or withdrawn themselves or himself therefrom, and have departed this life under the age of 28 years, and I shall have any other son or sons hereafter born who shall live to attain the age of 21 years, in which case such after-born son or sons shall have the election of coming into the said trade, and being admitted a partner or partners therein, if he or they shall think proper, in the place of his brother or brothers who shall so decline or refuse to become a partner or partners therein, or withdraw himself therefrom, or die under the age of 28 years, then when such after-born son or sons, as shall so elect to come into and be a partner or partners in the said trade, shall have attained the age of 28 years, or have departed this life under that age, and being in partnership as aforesaid at the time of such death, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall make up, state, and settle a full and general account, in writing, of all the stock, monies, debts, and effects, which shall be in or belonging, or due or owing to the said trade or

business, and shall and do cause a just valuation and appraisement to be made of all the particulars thereof, and do and shall in the first place (after raising and paying thereout the sum or sums of money hereinbefore mentioned, to each of my said sons and daughters, or such of them as shall have lived to become entitled thereto) raise thereout the sum of 20,000 l., and lay out and invest the same in the purchase of a competent share or competent shares of the parliamentary stocks or funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of, and interested in, the said stocks, funds, and securities to be purchased with the said sum of 20,000 l., upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same; and after the said several sums so to be raised shall have been raised as aforesaid, and all the legacies hereby given and bequeathed shall be answered and paid, and subject thereto, then upon trust, that they my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall part and divide all the residue and remainder of the said capital, stock, debts, and effects which shall be in or belonging, or due or owing, to the said trade or business, into double the number of shares as there shall be sons of my body now born, or hereafter to be born, who shall attain the age of 28 years and be then living, or who, while in partnership as aforesaid, shall have attained the age of 28 years, or die under that age, leaving a widow and a child or children living at his decease, or born in due time after, or a widow only living at his decease, or a child or children living at his decease but no widow; and if all my said sons, so electing to be and remaining partners, shall attain the age of 28 years, the whole of the said capital, stocks, debts, and effects shall be, in trust, for such my said sons,

in equal shares and proportions; and if I shall have but one son electing to be and continuing a partner, who shall attain the age of 28 years, and no son who, being and continuing a partner as aforesaid, shall depart this life under that age, leaving a widow and a child or children living at his decease, or born in due time after, or leaving a widow only, or a child or children then living but no widow, then the whole of the said capital, stock, debts, and effects to be in trust for that one son; and if I shall have one or more son or sons who, being a partner or partners, shall attain the age of 28 years, and one or more son or sons who, being and continuing a partner as aforesaid, shall die, leaving a widow and a child or children living at his or their decease or respective deceases, or born in due time after, or leaving a widow only, or a child or children living at his or their decease or respective deceases but no widow, then if only one of my sons, being and continuing a partner as aforesaid, shall have left a widow and children or a child living at his decease, or born in due time after, or have left a widow only, or a child or children only living at his decease and no widow, one of the said shares shall be laid out and invested in the public funds, upon the trusts hereinafter expressed and declared, for the use and benefit of the widow and child or children of such one son, dying while such partner as aforesaid, and leaving such widow, child or children as aforesaid; and if more than one of my said sons, being and continuing a partner as aforesaid, at the time of his death, shall have left a widow and a child or children living at their respective deceases, or born in due time after, or a widow only, or a child or children living at his or their respective deceases and no widow, then as many of the said shares shall be so laid out and invested, upon the trusts hereinafter expressed, as I shall have sons, being or continuing a partner as aforesaid, at the time of their deaths, who shall have respectively left a widow and a child or children living at their respective de-

ceases, or born in due time after, or have left a widow only, or a child or children living at their respective deceases and no widow; and the remainder of the said shares shall be divided between or amongst such of my said sons then living as shall have elected to become partners, and shall have continued partners in the said trade to their respective age of 28 years, share and share alike; and if but one shall be then living, who shall have elected to enter into and carry on, and shall have continued in the said trade, and shall have attained the age of 28 years, then such one son shall have and be entitled to the remaining shares thereof, the part or share, or parts or shares, of such widow and child or children, respectively to be ascertained, according to the then last preceding annual settlement, and to be paid to my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon trust, that they the said trustees, or the trustees or trustee for the time being, do and shall lay, place out, and invest the same in a purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, in their, or his, or her own names or name, and do and shall stand and be possessed of the said stocks, funds, and securities so to be purchased as aforesaid, upon such and the same trusts, for the benefit of such widow and children, and, with such limitations over, for the benefit of my other sons and their widows and children, and subject to such powers and provisos as are hereinafter mentioned, expressed, and declared of and concerning the stocks or funds to be purchased with the said sum of 20,000*l.* hereinbefore directed to be invested as aforesaid, so far as such trusts relate to the widows and children of the sons, for whom or for whose widow and children the said sum of 20,000*l.* is intended to be invested, or as near thereto as circumstances will permit.

Provided always, and in case I shall have no son

who, being a partner, shall attain the age of 28 years, and be living at the time hereinbefore expressed to entitle him to such surplus or remaining shares, and I shall have two or more sons who shall become partners as aforesaid, and while in partnership shall die and leave a widow and a child or children living at his or their decease or respective deceases, or born in due time after, or leave a widow only, or a child or children living at his or their decease or respective deceases and no widow, then it is my will that the widow and child or children, or widow only, or child or children, of such deceased sons, shall per stirpes and not per capita be entitled to have, take, and divide among them such surplus shares, in such proportions as shall be equal to the number of my sons who shall become partners as aforesaid, and while in partnership die, and leave such widow and child or children, or such widow only, or such child or children and no widow as aforesaid, and so that such widow or widows, and child or children may, in the proportions aforesaid, and according to their stocks, husbands and parents, respectively, be entitled to the whole of the surplus shares between or among them, according to the trusts hereinafter declared, of their said several and respective proportions; and in case I shall have only one such son as last hereinbefore mentioned, then it is my will that such widow and child, or children, or such widow only, or child or children of such only son, shall be entitled to have and take such surplus shares, and the full and whole benefit of the same, as well as the other provisions hereby made for him, her, or them, according to the trusts hereinafter declared. And in case I shall have no son who, being a partner as aforesaid, shall attain the age of 28 years, and be living at the time hereinbefore expressed to entitle him to such surplus shares, nor any son who shall become a partner as aforesaid, and while in partnership as aforesaid shall die, leaving such widow and child or children only

And if no sons or their families shall become entitled to these shares, then the whole remainder of the capital stock and effects of

as aforesaid, then and in that case all the residue and remainder of the said capital, stock, debts, and effects shall be in trust for all and every the children of my said daughters who shall attain the age of 21 years, such children of my said daughters to take per capita and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child, the whole to be in trust for that one child, and if none of my daughters shall have a child that shall attain the age of 21 years, then in trust for all my nephews and nieces who shall be then living, and the survivor of them, his, or her executors, administrators, or assigns,

the business to go to the children of testator's daughters, per capita and not per stirpes.

And I do hereby direct that my said trustees and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall stand and be possessed of and interested in the said stocks, funds, and securities so to be purchased with the said sum of 20,000*l.* hereinbefore directed to be raised upon the trusts, and to and for the intents and purposes hereinafter mentioned, expressed, and declared, of and concerning the same, that is to say, upon trust for all my sons, as well those already born as those hereafter to be born, in equal shares and proportions, during their respective natural lives, as tenants in common, and not as joint tenants; and after the decease of each such son, upon trust to pay to the widow of such deceased son out of the interests and dividends of such his share of the said last-mentioned stocks, funds, and securities, such annual sum not exceeding —*l.* per annum, as the said son shall, by writing under his hand and seal, and to be attested by two or more credible witnesses, or by his last will and testament, signed and published by him, in the presence of two or more such witnesses have directed or appointed in that behalf, and subject to such annual payment as last aforesaid, upon trust for all and every the child and children of each such son, equally to be divided be-

Trustees to stand possessed of the said sum of 20,000*l.*

In trust for the sons as tenants in common for their respective lives, and after their respective deceases in trust for their children respectively, in equal shares, per stirpes, with survivorship, respectively, subject to a provision for the widow of each such son.

tween or amongst the said children, share and share alike, and if but one, then in trust for such only child, the part or share. parts or shares of such children or child to be an interest vested, or interests vested in, and be paid to him, her, or them, at his, her, or their age or respective ages of 21 years, and if any such children shall depart this life under the age of 21 years, then as well the original part or share, parts or shares, of him, her, or them so dying, as the part or share, or parts or shares surviving or accruing by virtue of this present clause, shall go and be paid to the survivors or survivor, or others or other of the said children, and their respective executors, administrators, or assigns, to be an interest vested, or interests vested in and to be paid to the child or children respectively entitled thereto, at such time or times as is hereinbefore mentioned, with respect to his, her, or their original share or shares.

Clause for maintenance and education.

And I do hereby will and direct that after the decease of such son the interest, dividends, and annual produce of the share to which he shall be so entitled for his life of the said sum of 20,000*l.* and the stocks, funds, and securities in which the same shall be invested as aforesaid, or so much of the said interest, dividends, and annual produce as my said trustees for the time being shall think necessary, shall after the decease of their respective fathers, and subject to any provisions made under the power for that purpose hereinbefore given by this my will, for the widows of their fathers respectively, be paid and applied for or towards the maintenance and education of such child or children, in the mean time until he, she, or they shall respectively attain the age of 21 years, and the residue invested in such stocks, funds, and securities as aforesaid, so as to accumulate in the way of compound interest, and that such residue and the accumulations thereof shall be in trust for the persons who under this my will shall become entitled to the fund whence such accu-

mulation shall have proceeded. But in case any of my said sons shall at the time of his, or their respective decease, leave a widow only, and no child or children him or them surviving, or there being such child or children, in case all of them shall happen to die under the age of 21 years, then after the decease of such son or sons, as to the part or share, parts or shares of such son or sons as shall so die, leaving a widow or widows but no child or children who shall live to attain the age of 21 years, upon trust for his or their widow, or respective widows, during their respective natural lives, (if she or they shall so long continue sole and unmarried,) and in case any one or more of my said sons shall have no child who shall attain the age of 21 years as aforesaid, then after his or their decease, or respective deceases (subject to the provisions made or to be made as aforesaid, for his, or their widow, or respective widows as aforesaid, in the share or shares to which such son or sons shall have been so originally entitled for his or their life or lives respectively as aforesaid,) the same, immediately after the decease of such son or sons respectively, to be sub-divided into as many shares as there shall be sons of my body then living, or those dead, having left a child or children, and the said shares shall be upon such trusts for my said surviving other sons and their children respectively, as are hereinbefore declared, in respect to their said respective original shares, and so after the decease of any other son or sons under 21 years of age, the share or shares to which such last mentioned son or sons shall, or if living, would by survivorship or accruer be so entitled for life as aforesaid, shall also be upon such trusts for the then surviving or the other sons and their respective children as are hereinbefore declared, as to their said respective original shares, and if only one of my said sons shall have a child who shall attain the age of 21 years, then after the decease of the other of my said sons, and such failure of issue of their bodies respectively as aforesaid, (and

In case of the death of a son, leaving no children, but a widow only, in trust for her during her life, and subject to the widow's interest or provision, to go among the surviving sons and their families, with survivorship as to the accruing shares.

And in case all the sons shall die without leaving any child who shall acquire a vested interest, then, subject to the widow's interest, to go to children of the testator's daughters, and if none of the daughters shall leave a child who shall acquire a vested interest, then the interest of the whole to be for the wife of testator, durante viduitate, and upon her decease to testator's nephews and nieces, their executors, administrators and assigns.

subject to the provisions hereinbefore and hereinafter contained for their widows respectively,) the whole of the said sum of 20,000*l.*, and the stocks, funds, and securities on which the same shall be invested, to be upon such trusts for such only son and his child or children respectively, as hereinbefore is declared, as to his original share of or in the same. And in case none of my said sons shall have a child who shall attain the age of 21 years, then as to the whole of the said stocks, funds, or securities hereinbefore directed to be purchased as aforesaid, (subject to the powers and provisions hereinbefore contained,) upon trust for all and every the children of my said daughters who shall attain the age of 21 years, such children of my said daughters to take per capita and not per stirpes, in equal shares and proportions, if more than one; and if there shall be but one such child the whole to be in trust for that one child; and if none of my daughters shall have a child who shall attain the age of 21 years, then upon trust to pay one moiety or equal half part of the interest, dividends, and annual produce of the said sum of 20,000*l.* and the stocks, funds, and securities on which the same shall be invested, unto my said dear wife during the term of her natural life, in case she shall so long continue sole and unmarried, but without making any deduction out of her said annuity of —*l.* in respect thereof, and subject thereto do and shall stand and be possessed of and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, in trust for all my nephews and nieces who shall be then living, or the survivor of them, and the executors, administrators, and assigns of such survivor.

Legacies to after-born sons, who are also to have equal shares in the 20,000*l.*

Provided also and my will is, that in case I shall have any other son or sons hereafter born, either in my life-time, or in due time after my decease, then I give and bequeath unto every such after born son

Provisions for continuance of Testator's Trade.

659

2000*l.* to be an interest vested in and to be paid to him on his attaining the age of 21 years, and the sum of 4000*l.* to be an interest in and to be paid him upon his attaining the age of 24 years; and my will is, that every such after-born son, and his child and children (if any) shall have and be entitled to a share of the stocks, funds, and securities, to be purchased with the said sum of 20,000*l.* hereinbefore directed to be invested as aforesaid, equally with my said sons W. F. T. and G. and their children, the same to be payable and paid at such time and times, and with, under, and subject to such and the same powers, provisos, and limitations, and to be attended with the same right of survivorship, and in such and the same manner in all respects as the shares to or in trust for my said sons, W. F. T. and G., and their widows and children, of and in the same stocks, funds, and securities, are hereinbefore directed, limited, given, and bequeathed.

Provided also, and my will is, and I do hereby direct, that in case any of my said sons shall depart this life, whilst in the said business, before he shall attain the age of 28 years, leaving either a widow and one or more child or children him surviving, then and in such case, as often as the same shall happen, I do hereby direct that such account and valuation as aforesaid shall be made, taken, and settled, and that the part or share of such of my said sons so dying, of and in the said sum of 20,000*l.* shall forthwith be raised and laid out and invested in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, in the names or name of my said trustees or trustee for the time being, upon such and the same trusts, for the benefit of his widow and child and children, and subject to the same powers, provisos, and limitations over as are hereinbefore directed, and shall not wait till all my sons shall attain the said age of 28 years, any thing herein-

Upon the death of any son in the business before 28, leaving a widow or children, his share in the 20,000*l.* immediately to be raised and invested and not to wait till the other son or sons shall attain 28 years.

before contained to the contrary thereof in any wise notwithstanding.

In case all the sons shall decline the business, then all the property and effects of the trade to be sold, and the 20,000*l.* to be raised and invested for the purposes aforesaid, and the residue of the money to be applied as the residue of the capital, stock, &c. are before directed to be applied.

And my will is, and I do hereby direct, that in case all my sons shall refuse or decline to carry on the said trade or business, then and in such case, I do hereby direct that when all my said sons W., F., T. and G., who shall live to attain the age of 28 years, shall have attained that age, and there shall be no after-born son or sons, or in case there shall be any after-born son or sons, when all my after-born sons who shall live to attain the age of 22 years shall have attained that age, the said trade, stock, and effects, employed therein, shall be sold to the best advantage, and the debts due and owing to the said trade shall be collected by my said executors, or the survivors or survivor of them, or the executors or administrators of such survivor. And from and immediately after such sale as last aforesaid, they my said (trustees), and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall by and out of the money which shall arise by such sale, and which shall be collected as aforesaid, lay out and invest the said sum of 20,000 *l.* in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in their own names, or in the names or name of the survivors or survivor of them, or of the executors or administrators of such survivor, upon the trusts, and to and for the intents and purposes hereinbefore mentioned, expressed, and declared of and concerning the same, and shall and do devise and apply the residue of the money which shall arise by such sale or sales, in such and the same manner as the residue of the capital, stock, debts, and effects, are hereinbefore directed and applied. And in case all my sons, as well those already born, as those hereafter to be born, shall depart this life under the age of 21 years, then my will is, and I do hereby direct, that the said capital, stock, goods, debts, and effects, shall be forthwith sold and

And in case all the sons shall die under 21, the business to be sold, and the produce invested for testator's

disposed of, or collected in such manner as is herein before directed in case all my said sons should refuse or decline to carry on the said trade or business, and that the whole produce thereof shall be forthwith placed out, and invested in the purchase of a competent share or competent shares of the parliamentary funds of Great Britain, in the names or name of my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, upon such and the same trusts, for the benefit of my said wife and daughter, and their children, and my nephews and nieces as are hereinbefore mentioned, expressed, and declared of and concerning the stocks, funds, or securities, to be purchased with the said sum of 20,000 l. in the event of all my sons dying without leaving a widow, him or them surviving, or any child or children who shall live to attain the age of 21 years.

wife and daughters, and their children, and his nephews and nieces, as before directed with respect to the 20,000 l.

Testator then gives several pecuniary legacies and small sums, for charitable purposes.

And as to, for and concerning all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind or quality soever the same may be, both real and personal, which I shall be seised or possessed of, interested in, or in any manner entitled unto, in possession, reversion, remainder, or expectancy, at the time of my decease, I give, devise, and bequeath the same unto my said trustees, their heirs, executors, administrators, and assigns, according to the nature and quality thereof, upon trust, to sell and dispose thereof, either by public sale or private contract, and convert the same into money as soon as conveniently may be after my interment, and add the same to the capital of my said trade or business, and employ the same therein in such and the same manner, and to stand and be possessed thereof, subject to the legacies hereby given, upon such and the same trusts, and to and for such

All the residue of the testator's property, real and personal, to be sold, and the money applied in the same manner as the residue of the capital, stock, and effects, are before directed to be applied.

and the same intents and purposes as are hereinbefore mentioned, expressed and declared of, and concerning the residue of my said capital, stock, debts, and effects. And for facilitating the sale of my estate and effects in the manner hereinbefore mentioned, I do hereby direct that the receipt and receipts of my said trustees, or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, shall from time to time be a good and sufficient discharge, and good and sufficient discharges to the purchaser or purchasers of the said premises so to be sold as aforesaid, or any of them, or any part or parts thereof, or to any other person or persons, paying to them any other sum or sums of money under the trusts of this my will, and to his, her, and their respective heirs, executors, administrators, and assigns, for so much money as shall be therein acknowledged, or expressed to have been received. And that such purchaser or purchasers, or other person or persons, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application thereof, or any part thereof*. And I do hereby nominate, constitute,

* As to the necessity of this provision, see before, in page 520. Where such a clause is omitted; the best way to cure it is for the purchasers to see the whole of their purchase-money invested in the 3 per Cent. Bank Annuities, in the name of the executors or trustees who may thereupon execute deeds, declaring the money so invested to be the same money for which the estates (describing them) were sold, and that the money is so invested on the trusts of the will; and each purchaser should have one part of such deed declaring the trusts of the purchase-money. The Bank books will always, on inspection, afford evidence of the sum's having been actually invested in such a quantity of Stock, which will correspond with the precise quantity mentioned in the declaration of trust, and together they will be sufficient proof of a proper application according to the will, so as to absolve the purchaser. It was the opinion of the late Mr. Serjeant Hill, that the purchaser would then have a safe title without a decree; but otherwise he would not be safe, because he has notice of the trust.

and appoint my said wife, together with the said (trustees), to be executrix and executors of this my will, and in case of the death of any two or more of them before the trusts of this my will shall be fully executed and performed, then I do nominate, constitute, and appoint my two eldest sons, for the time being, when they shall respectively have attained the age of 18 years, to be executors of this my will, in the place and stead of such two or more of them, my said wife and the said trustees, as shall so die before the trusts of my said will shall be fully executed and performed, and with all the same power and powers, authority and authorities, to all intents and purposes whatsoever, as such executrix or executors, who shall so happen to die, had or might have under and by virtue of this my will, at the time of his or her death.

Executors
appointed.

Substitutionary
executors named.

To obtain a decree, if a decree be necessary, the trustees, or any person as *prochein ami* for the infant testui que trusts, may file a bill to compel a specific performance of the contract by the purchasers, and then the Court will direct and confirm the sale. But purchasers of leasehold or chattel estates or interests will be safe without any decree, notwithstanding the omission to make the receipts of the trustees discharges, if the trustees are also *executors*, for the property in such subjects always vest in the first place, notwithstanding the dispositions of the will, in the executors. A testator cannot prevent them from being assets in the hands of the executors to go in a due course of administration. The power of sale is annexed to their office, and the purchaser is never obliged to enter into the account, or enquire into the necessity of any sale, 4 T. R. 625, *Whale v. Booth*, 2 P. Wms. 149, *Ewer v. Corbitt*. But the transaction must be clear of all fraud or collusion, for if it be tainted with these qualities the estate will be specifically followed into the hands of the purchaser. So where there is express notice of a debt of testator unsatisfied, and the sale is a contrivance between the purchaser and executor to defeat the debtor, the purchaser makes himself party to the *devastavit*; see 2 Vern. 616, *Crane v. Drake*, 1 Atk. 463, *Nugent v. Gifford*, 7 Vez. jun. 152, *Hill v. Simpson*. And if such sale be without valuable consideration it falls within the statute, 13 El. c. 5, *Gilb. Eq. R.* 111.

Power to the trustees to renew the lease of the testator's dwelling house, or to purchase other premises, with full discretionary powers for managing the trade.

And I do hereby declare my will to be, that it shall and may be lawful to and for my said wife and the said (trustees) and also to and for my said two eldest sons, when they shall severally become entitled to prove and shall have proved this my will, and the survivors or survivor of them, and the executors or administrators of such survivor from time to time, if need be, to renew the lease of my dwelling-house and premises wherein the said trade or business is now carried on, or to purchase the fee-simple thereof, or of any undivided part or share thereof, or to take any other dwelling-house, shop or shops, warehouse or warehouses, or other premises, at such rent or rents as they shall think proper, for the purpose of carrying on the said trade or business, and to hire and employ any servant or servants, clerk or clerks, or any other person or persons whomsoever, to be employed therein, at such salary or wages as they, my said trustees and executors for the time being, shall think proper, and to repose in such servant or servants, clerk or clerks, or other person or persons, so much and such confidence, trust, power, or authority, in the conducting and carrying on of the same trade or business, and in the management, care, and disposal of the stock employed or to be employed therein, and in the receipt of any debt or debts to be contracted, in or by the carrying on the trade hereby directed to be carried on, as they my said trustees or the survivors or survivor shall in his, her, or their discretion think fit, provided that after any or either of my said sons shall become partners or partner in the said trade or business, such of them as for the time being shall be partners or partner therein, shall have a voice therein, as well as my trustees and executors for the time being, so as that in case of a difference in opinion, the majority of voices shall decide as hereinafter is mentioned; and also to adjust, settle, compromise and compound all accounts, reckonings, transactions, matters, and

things, in which I shall be concerned or interested at the time of my decease, or which shall be opened or contracted, or shall arise after my decease, and to pay, on any evidences they shall think proper, any debts claimed from my estate, and also to dismiss any such servant or servants, clerk or clerks, or other person or persons ; and (with such consent as aforesaid) to hire and employ any other or others in his, or their stead, and that from time to time, and as often as my said executors shall think proper. And I do hereby will, direct, and declare, that in all cases where my trustees, and executors for the time being shall happen to differ in opinion, the matter of such difference shall be decided by the major part or number of them my said trustees and executors, and be acted upon accordingly. And I do hereby declare my will to be, that they my said executors, and their respective executors and administrators, shall not be answerable or accountable for any loss or damage which shall come or happen to the stock or capital to be employed in the said trade or business, by bad debts, decay of goods, suit or action, or suits or actions, in any court or courts of law or equity, or any other casualties or accidents whatsoever, or by reason of the trust and confidence which they or any of them shall or may place or repose in any servant or servants, clerk or clerks, banker, broker, or other persons with whom any part of the said trust-monies shall or may be deposited or lodged, for safe custody or otherwise, or for any other loss or damage which may happen about the execution of this my will, or all or any of the trusts hereby in them reposed ; and that they my said trustees and executors, and their respective executors and administrators, shall not be charged or chargeable with or for any sum or sums of money, other than such as shall actually and respectively come to his, her, or their hands by virtue of this my will.

If the trustees and executors differ in opinion, the matter in difference to be decided by the majority.

And my will is, and I do hereby further direct, that it shall and may be lawful to and for my said trustees and executors, and each and every of them, by and out of all or any of the monies which shall come to their or any of their hands, by virtue of this my will, to deduct, retain to, and reimburse themselves, himself, and herself, and to allow his, her, or their, co-trustee, or co-trustees, all such costs, charges, and expences, as they respectively shall or may sustain, expend, or be put unto, in or about the execution of all or any of the trusts, hereby in them reposed, or in anywise relating thereto. And I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament.

In witness, &c.

A comprehensive Devise and Bequest of various descriptions of Property to Trustees, for sale and accumulation of the Produce.

I GIVE, devise, and bequeath all my stocks, funds, money, mortgages, and all lands, tenements, and hereditaments whatsoever, to which I am beneficially intitled, or which have been conveyed to, or vested in me by way of mortgage, security, or trust, and all my estate, right, title, and interest of, in, and to such mortgaged premises, and all securities for money, and all my goods, chattels, and personal estate whatsoever and wheresoever, and of what nature or kind soever, not otherwise by me disposed of, after and subject to the payment of my just debts, funeral expences, and the several legacies, bequests, and dispositions by me given, bequeathed, or made, or hereafter to be given, bequeathed, or made, and all

my estate and interest therein, unto the said ——— and ———, their heirs, executors, and administrators respectively, according to the several natures and qualities of the same, upon the trusts following (that is to say) upon trust, that they my said trustees and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall stand and be seised and possessed of the estates vested in me as a trustee, upon the trusts thereof respectively, and to re-convey, assign, and dispose of the mortgaged lands, tenements, and hereditaments, when the principal and interest thereby secured respectively are paid off, and receive the principal and interest which shall be due therefrom respectively, and give receipts for the same when paid; and also do and shall sell and dispose of all the real estates, to which I am beneficially entitled, and of which I have power to dispose, and also all the leasehold estates that I may hold at the time of my decease, from time to time, as they shall find purchasers for the same, or do and shall sell the same at public auction, or otherwise, at their discretion, subject nevertheless and without prejudice, to the privilege hereinbefore given to my said wife, of occupying, during her life, such of my leasehold houses as may be in my own occupation at the time of my decease; and also shall and do make sale of such other parts of the residue of my personal estate as shall be saleable. And I hereby declare, that the receipt or receipts of the said ——— and ———, or the survivor of them, or the executors or administrators of such survivor, shall be effectual discharges for so much money as shall be therein acknowledged or expressed to have been received. And I do hereby declare my will to be, and direct, that the said ——— and ———, and the survivor of them, and the executors or administrators of such survivor, shall and do from time to time place out and invest the monies which shall arise by sale of my

real estate, and such parts of my personal estate as are saleable, including the leasehold estates directed to be sold as aforesaid, and also such monies as shall be collected, received, or got in, from the other part of my personal estate as aforesaid, and the intermediate dividends, interest, and proceeds thereof, in the stock of the Bank of England, or on real or government securities, or in some of the public funds, in the names of the said ——— and ———, or the name or names of the survivor of them, or of the executors or administrators of such survivor; which securities and funds, and all other securities and funds, in or upon which all or any of the said trust monies, or any other trust-monies which shall come to their, or any of their hands, under or by virtue of this my will, or the trusts or powers herein expressed, and not hereinbefore directed to be otherwise disposed of, shall be invested, it shall and may be lawful to and for my last-named trustees, or the survivor of them, or the executors or administrators of such survivor, to alter and transpose at discretion. And I do hereby declare my will to be, that the dividends, interest, and proceeds of all such securities and funds, shall from time to time be accumulated and laid out on such securities or funds as aforesaid, in the names of the said ——— and ———, or the name or names of the survivor of them, or of the executors or administrators of such survivor, and that a like disposition shall be made of the dividends, interest, and proceeds of the securities and funds, in or upon which such accumulated dividends, interest and proceed shall be so invested, and so from time to time with respect to the future accumulated dividends, interest, and proceeds of such several and respective securities and funds, and of such other securities and funds, in or upon which any accumulated dividends, interest, and proceeds shall be invested, but so as no such accumulation be carried or made beyond the term of 21 years, to be computed from the time of my

decease *. And my will is, and I do hereby further declare and direct, that the said ——— and ———, and the survivor of them, and the executors and

* The great question as to the ultimate period to which these trusts for accumulation might be extended, (which depended upon the extent of time during which the vesting and power of alienation of property might be legally suspended,) was determined in the much agitated, and solemnly decided case of *Thelluson v. Woodford*. See 4 Vez. Jan. 227, and 11 Vez. Jun. 112. In which case there was a devise of real estates of the annual value of near 5000 l., and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000 l. to trustees and their heirs, &c., upon trust during the lives of the testator's sons A. B. and C. and of his grandson D. and of such other sons as A. then had or might have, and of such issue as D. might have, and of such issue as any other sons of A. might have, and of such sons as B. and C. might have, and of such issue as such sons might have as should be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates should be divided into three lots, and that one lot should be conveyed to the eldest male lineal descendant, then living, of A. in tail male; remainder to the second, &c. and all and every other male lineal descendant or descendants then living of A., who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was limited, successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants, then living, of B. and C., as tenants in common in tail male, in the same manner with cross-remainders; or, if but one male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of A. B. and C. as aforesaid, upon trust, to sell and pay the produce to his Majesty, his heirs, and successors, to the use of the sinking fund: the accumulation, till the purchases or sales could take place, to go to the same purpose; with a direction that all the persons becoming entitled should use the surname of the testator only.

Origin of, and observations upon, the Accumulation Act.

The validity of this will was opposed on several grounds, viz.—*as morally vicious*, being a contrivance of a parent to exclude every one of his issue from the enjoyment of even the produce of his property for nearly a century, and therefore an abuse of the allowance of the law for enabling persons to provide for the reasonable occa-

administrators of such survivor, shall and do from time to time, as convenient purchases shall be found, make sales of a competent part of the securities and

sions of their families—as *politically injurious*, being calculated to keep an immense property during the time aforesaid unproductive, and at the end of that period to create a fund, the revenue of which would be greater than the Civil list; the probable amount of the accumulated fund of one third being 19,000,000 £., and in case of a minority at the end of the period lasting 10 years, 10,802,373 £. And should the *whole* property centre in one person with a minority of 10 years, the whole accumulated fund would be 32,407,120 £.

—*As going beyond the legal boundary*, since in all the other cases, the lives during which the suspence was to be continued, were of those immediately connected with, or immediately leading to, the person in whom the property was first to vest.—*As a fraud upon the rule*, since by assigning for the period of suspence, a number of lives, whose average duration was equal to a given number of years, and thus indirectly making years, not lives to constitute the period of suspence, property might be suspended for a century.—*As attempting to protract the accumulation during the lives of persons unborn at the time of the testator's decease*, the testator having included the lives of persons to be born within due time after his decease; and though a child in ventre sa mere might be considered as in existence, where the limitation was for his own benefit, and he was to take when born in the character of heir, or where the subject of the trusts was personal estate, yet no cases could be mentioned, the subject being real property, in which a child in ventre sa mere has been held to be in existence, for any purpose except to limit the estate of the first devisee, or for the actual benefit of the child himself, being the substituted devisee.—*An objection was also taken upon the grammatical construction*. But all these arguments were over-ruled, and it was considered, that as the law stood at the time of Mr. Thelluson's decease, it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of any number of persons in being, and for 21 years after the survivor's decease, and a further number of months, equal to the duration of pregnancy. And that as the term of suspence and accumulation, directed by Mr. Thelluson, was confined to the lives of persons in being at the time of his decease, or born in due time afterwards, or in ventre sa mere at his decease, and the life of the longest liver of them, without any reference to any farther number of years, it not only did not exceed, but fell short of the boundary to which, according to the rules of law, it might have been extended. This was a plain executory devise, and every executory devise was good which did not tend to make an estate unalienable beyond the time, at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of 21.

funds in or upon which the several and respective trust monies last^d mentioned shall be invested, or call in a competent part of such trust monies, and lay out and invest the same from time to time in the purchase of freehold manors, messuages, farms, lands, tenements, or hereditaments of a clear and indefeazible estate of inheritance in fee simple, in possession, situate, arising, or being in some convenient place or places in that part of Great Britain called

And the Court had no other criterion to judge of the inconvenience except by analogy to the restraint which the common law imposes upon the alienation of real property; and as to the point respecting the legal existence of a child in ventre sa mere, it was considered as decided in *Long v. Blackall*, 7 T. R. 100. The Judges were unanimous. But it has been considered by the Legislature as expedient *in future* to restrain the power of accumulation, and therefore the statute of the 39 and 40 Geo. 3. c. 98. was passed, by which, as will be seen by referring to it in the appendix of statutes in this volume, the power of settling and devising property for the purpose of accumulation is restrained in general to 21 years after the death of the grantor or testator. And no person can now by any deed or will, or by any other mode, settle or dispose of any *real* or *personal* property, so as that the rents or profits may be wholly or *partially* accumulated for a longer term than the life of the grantor, or the term of 21 years after the death of the grantor, or the testator, or the minority of any person who shall be living, or in ventre sa mere, at the death of the grantor or testator; and where any accumulation is directed otherwise, such direction shall be void; and the rents and profits during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto if no such accumulation had been directed. But the act is restrained from applying to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of woods and timber.

Upon this statute, however, the Court of Chancery has held, that a trust by will for accumulation beyond the period thereby allowed, is void only for the excess; and therefore, where the accumulation was directed until the age of 21 of the legatee, not born at the testator's decease, it was determined to be good for 21 years; and it was said by the present Master of the Rolls, that if an accumulation was directed to continue for 24 years, it would be good for 21, within the determination in *Griffiths v. Vere*, decided by Lord Eldon. See *Griffiths v. Vere*, 9 Vez. Jun. 127, and *Longdon v. Simpson*, 12 Vez. Jun. 295.

England, free from incumbrances except chief or quit rents, or other inconsiderable outgoings, together with such copyhold hereditaments, as may be intermixed, or be necessary or convenient to be held and enjoyed therewith, if any such there shall be, and the person or persons who for the time being shall by virtue of or under the limitations in this my will contained, be intitled in possession to my said mansion house, called ———— place, shall approve thereof, such approbation to be testified in writing; and shall and do convey, settle and assure, or cause to be conveyed, settled, and assured, all and singular the hereditaments so to be purchased with their respective appurtenances, to and for such uses, intents and purposes, upon such trusts, and with, under, and subject to such powers, provisos, limitations, declarations, and agreements, as are herein declared or expressed, of or concerning the hereditaments herein before by me devised, and which shall from time to time be subsisting, undetermined, and capable of taking effect. And I do hereby further declare my will to be, that the dividends, interest, and annual proceeds of the several funds and securities in or upon which the said several and respective trust-monies, and the trust-monies accruing thereupon, shall at the expiration of the said term of 21 years be invested, shall from the expiration of the said term of 21 years, go and be paid and payable to such person and persons, and in such course, order, and manner, as the rents and profits of the several hereditaments herein before by me devised, shall, by virtue of the limitations aforesaid, go and be payable and applicable.

Devise of an Advowson to Trustees to present a certain Person to the next Avoidance.

I GIVE and devise my advowson and right of patronage of and to the living of H. in the county of ———, to F. P. of, &c. and W. L. of, &c. and their heirs, to the use of the said F. P. and W. L., their heirs and assigns, in trust that they or the survivor of them, or the heirs or assigns of such survivor, shall and do present I. T. of, &c. to the next turn or avoidance thereof, and subject thereto, upon trust to convey the same to and for such uses, intents and purposes, upon such trusts, and under and subject to such powers, provisos, limitations, declarations, and agreements, as in and by this will are limited, declared, and expressed, of and concerning my other hereditaments, and real estate, in the county of, &c. or such of them as are subsisting and capable of taking effect. .

Words of a Will whereby a Testator charges his Debts, Legacies, &c. upon all his Estate.

THIS is the last will and testament of me M. H., of, &c. made this ——— day of ———, in the year ———. I charge all my real and personal estate, of what nature or kind soever, with the payment of all my debts, funeral expences, and legacies, as well such as I shall hereby give, as such other legacies and

annuities as I may hereafter give by any codicil or codicils to this my will.*

Clause to prevent an Annuitant under the Will from parting with his Annuity.

AND my will further is, and I do hereby expressly declare and direct, that in case my said nephew A. B. shall alien, sell, assign, incumber, or transfer, or in any manner dispose of or anticipate the said annuity or yearly sum of 200 l. or any part thereof, then and in such case, and from and immediately after such alienation, sale, assignment, or transfer, the said bequest so made thereof as aforesaid, and the use and estate so given to him therein shall cease and be void, to all intents and purposes as if, the same had not been mentioned in this my will, or as if the said C. K. were naturally dead.

* By a will duly executed, charging land generally with legacies, a testator enables himself to lay any number of additional legacies on the land by a subsequent testamentary disposition unexecuted. See chap. 1. part 6.

To entitle a legatee to recover his legacy out of the real estate, there seems to be no necessity for proving the will in the Spiritual Court. 3 Atk. 361.

It is to be observed that words importing clear intention to charge the realty are necessary to make the land in the hands of a specific devisee subject to legacies; therefore, if a clause either at the beginning or end of a will runs thus, "First, I will and direct that all my debts, legacies, and funeral expences shall be fully paid," these words will not give the legatees place of the *specific* devisees, though perhaps by such words the residuary real estate might be charged with the legacies. And perhaps also this would be considered as sufficient to charge even *specific* devisees in their order, (for the general devisee and the heir come first into contribution) with the *debts*. See *Kightley v. Kightley*, 2 Vez. Jun. 328. But the Lord Chancellor doubted of the distinction in this respect, in *Williams v. Chitty*, 3 Vez. Jun.

Devise of Copyholds, and Leaseholds for Lives and Years, to Trustees to the same Uses as the Freehold.

AND I give and bequeath all my customary or copyhold * messuages, lands, and hereditaments, and also all my messuages, farms, lands, tenements,

545. The Master of the Rolls, however, maintained the distinction again in *Shallcross v. Finden*, 3 Vez, Jun. 739. And see 3 P. Wms. 91. *Harris v. Ingledew*, ib. 358.

In this last case the words at the beginning were "After payment of all my just debts, funeral expences," and it was clearly held that the *debts* were charged by these words.

* In the part of the 1st chapter of this treatise, the necessity for and the operation of a surrender of copyhold estate to the use of the will made or to be made, has been considered. To what has been there observed, it may here be added, that for the will to have its legal effect, it is necessary that the party, when he makes the surrender to the use of his will, should have the legal estate, otherwise the surrender to the use of the party's own will, can have no effect, any more than if the surrender were made to a stranger. Thus, where a copyhold was surrendered to J. S. on the 10th October, 1793, and the surrenderee afterwards, and before he was admitted, surrendered the same to the use of his will; and on the 17th June, 1795, and not before, the surrender was presented and the testator admitted; it was held that the surrender to the use of the will was inoperative, and that the admittance did not relate, for before the surrender to the testator was executed by the admission, the legal estate was wholly in the surrenderor, and the surrenderee could not enter without being a trespasser to the surrenderor, and the surrenderee could not have maintained ejectment unless he was admitted before the trial. And as to the question of relation, it was held that the admission could not relate so as to validate the surrender by J. S. to the use of his will, for though relation will in many cases help acts in law, it will not help the acts of the party, that is, it will not make void acts of parties good by the fiction of law. See the learned judgment pronounced by Lord Ellenborough, in the case of *Doe on dem. Tofield v. Tofield*, in the 10th vol of East's Reports. And for the doctrine of relation the reader is referred to the 8th part of chapter 2 of this treatise. The reader will observe, that in this case there was an original

Of the necessity for the party's having the legal estate in him at the time of his surrendering it to the use of his will.

and hereditaments whatsoever, which I hold by virtue of or under any grant, lease, or demise, from the Crown, or any College in either of the Universities, or from any bishop, dean and chapter, or other person, body politic or corporate, ecclesiastical or civil, for any term of life or lives, or years determinable on deaths, or usually renewable at certain times and periods respectively, and also all my leasehold messuages, lands and tenements, which I hold for any term or number of years (in case any such there be) unto the said ——— and ———, their heirs, executors, administrators, and assigns respectively, according to the nature and quality of the same respectively, for and during all my estate and interest therein, upon trust that my said trustees, and the survivor of them, his heirs, executors, and administrators, shall and do settle and assure the same, so and in such manner as that the clear residue of the rents, issues, and profits of the same copyhold and leasehold premises respectively, may be received, taken, and enjoyed by and for the use and benefit of such person or persons as for the time being shall by virtue of this my will, and the settlement to be made according to the directions hereinbefore contained, be entitled to any estate of freehold and inheritance, of and in my said manors, hereditaments, and premises in the said

defect of estate and not of a surrender, so that this was not a case for Equity to supply a surrender, which it would have done if the testator had had the legal estate, and had only omitted the surrender to the use of his will, as the wife was the devisee. But in another view of the equity of the case, it should seem there was a good ground of relief; since the first surrender was for valuable consideration, and gave the surrenderee an equitable interest, and it has always been the rule of equity, that where a party has the beneficial interest only in copyhold lands, he may devise them, and they will pass by his will as well as any other lands, without a surrender. See 2 Atk. 37, *Tuffnel v. Page*. 3 P. Wms. 360, *King v. King*. 1 Atk. 390, *Macey v. Shurmer*. 1 Vez. 121, *Allen v. Poulton*. 1 Bro. C. C. 481, *Macnamara v. Jones*.

counties of ——— and ———, and until some persons entitled to an estate of inheritance shall, by good assurances in the law, become seised of the said manor, hereditaments, and premises in fee-simple, in possession; and immediately upon or after that event the trustees in the said settlement of the said copyhold and leasehold premises, shall be thereby directed and required to surrender, assign, and assure the said copyhold and leasehold lands, tenements, and premises, with their and every of their appurtenances, and all estates, terms, and interests of my said trustees, of, and in the same, unto such person or persons so seised of, or entitled to the inheritance of the said manors, messuages, lands, and hereditaments aforesaid, by such deeds, writings, instruments, surrenders and assurances, as by such person respectively, or by his counsel learned in the law, shall be reasonably advised or required: and also upon trust that my said trustees, and the survivor of them, his heirs, executors, or administrators, in the mean time and until such settlement shall be made, do and shall, by and out of the rents and profits of the said leasehold premises, pay the rents and perform the covenants reserved by the original and subsisting leases, and also by and out of my personal estate renew the leases of the same premises, and take new leases thereof respectively in their own names, when and as it shall be usual and requisite, and also from time to time make such proper surrenders of the leases subsisting, as shall be requisite and necessary or incident to such renewals, and also do and shall by and out of my said personal estate or the rents and profits aforesaid, pay and discharge the fines and fees of admissions to, and surrenders of, my said copyhold lands.

Devise of the Residue of Testator's personal Estate, in Trust, to sell, call in, dispose of, and convert into Money, such Part as shall not consist of Stock or real Securities, and invest it in Securities, and thereout make Provision for a collateral Relation.

AND as to all the rest, residue, and remainder of my personal estate, money in the public funds, and money out at interest, and securities for money, arrears of rent, goods, chattels, and effects, of what nature or kind soever, not herein specifically bequeathed, I hereby give and bequeath the same, and every part thereof, unto the said _____ and _____, their executors, administrators, and assigns, upon trust, that they the said _____ and _____, and the survivor of them, and the executors or administrators of such survivor, shall and do, as soon as conveniently may be after my decease, receive, collect, call in, dispose of, and absolutely convert into ready money, so much and such part of the said residue of my personal estate to them bequeathed as shall not, at the time of my decease, consist of stock in the public funds, or of government or real securities; and shall and do lay out and invest all such sum and sums of money, as shall arise by converting into ready money all such part of the said residue of my personal estate as aforesaid, either in the public funds or on real or government securities, at interest, and shall and do stand and be possessed thereof, and also of all such part of the residue of my personal estate as shall not, at the time of my decease, consist of stock in the public funds, or of government or real securities respectively, and of the interest, dividends, and annual produce thereof, upon the trusts, and sub-

ject to the directions and declarations hereinafter contained, (that is to say) upon trust, that my said trustees, or the survivor of them, and the executors, administrators, or assigns of such survivor, shall and do, by and out of the same residue, raise ———l. of lawful money of Great Britain, and pay the same to the said ———, or to such person or persons as she shall by any deed or writing, executed by her in the presence of two or more credible witnesses, direct or appoint, immediately upon or in certain prospect of her marriage, as and for her pecuniary fortune or marriage portion, and for which her receipt alone, notwithstanding her coverture, or that of her legal assignee, shall be an effectual discharge, so as an adequate and proper jointure and provision for her and her issue be settled and secured in consideration thereof. Provided that in case my said niece shall die without having been married, then the said sum of ———l. shall not be raised and paid at all, but shall sink into and become a part of the residue of my personal estate, for the benefit of the person or persons who shall become entitled thereto under this my will.

Bequest of Jewels, &c.

I ALSO give to my said wife the use of all my jewels and pearls, usually worn by herself, during her widowhood; and upon the marriage or decease of my said wife, which shall first happen, I give the same jewels and pearls to the said E. A. and G. C., their executors, administrators, and assigns, upon trust, that they permit and suffer them to be used and enjoyed by the person or persons who from

time to time shall, by virtue of the limitations to be contained in the settlement so to be made as aforesaid, be for the time being entitled to the immediate freehold of the estates to be therein comprized, but so as that the same shall not vest in any child or children of any person or persons to be therein made a tenant or tenants for life, who, being a son or sons, shall not attain the age of 21 years, or being a daughter or daughters, shall not attain that age, or marry. Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son W., and after his decease, my son T. and my grandson L., when and as by virtue of any of the limitations to be contained in the settlement or settlements so to be made as aforesaid, they shall respectively be entitled to the immediate freehold of the hereditaments in such settlement or settlements to be comprized, by any deed or deeds, instrument or instruments, to be by them respectively sealed and delivered, in the presence of, and attested by, two or more credible witnesses, or by their respective last wills and testaments, or any codicil or codicils thereto, to be by them respectively signed and published in the presence of, and attested by, the like number of witnesses, to direct or appoint, that any woman or women, whom they may respectively marry, shall have the use of all or any part of the said jewels or pearls, during her or their widowhood or respective widowhoods, and my said trustees shall permit and suffer the same to be used or enjoyed by her or them accordingly. Provided always, and I do hereby direct the said E. A. and G. C., and the survivor of them, and the executors, administrators, and assigns of such survivor, at the request of the person or persons who for the time being shall be entitled to the use of the aforesaid jewels and pearls, by virtue of this my will, to have them or any of them reset, so that their value shall not thereby be

lessened, the expence of such resetting to be paid out of the fund hereinbefore directed to be established, or to exchange the same or any of them for others of equal or greater value (except with respect to my family pearl necklace, the ruby ring set with diamonds, the emerald ring set with diamonds, and the sapphire ring with the figure of ——— engraved upon it, which I desire may be preserved in their present state). Provided, and I do hereby declare my will to be, that it shall and may be lawful to and for the said L. C. H. to have the use of my pearl bracelets with diamond clasps, (1) during her life, unless she shall marry again; but that immediately upon her decease or second marriage, which shall first happen, the same shall vest in the said E. A. and G. C., or the survivor of them, his executors or administrators, upon such trusts as hereinbefore declared or expressed of or concerning the jewels aforesaid.

*Appointment under a Power for the Benefit of
Testator's younger Children.*

AND whereas my surviving daughters have respectively attained the age of 21 years, but my younger son is still an infant, of the age of 15 years, now I,

(1) If a testator bequeaths a certain thing which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant among the testator's property, as, if he bequeaths it by the words 'my watch, my diamond ring,' &c.; but if he says, 'I bequeath a watch,' or, 'a diamond ring,' the legacy will have its effect, if the value and species are described so as to render it sufficiently certain: and this is the rule of the civil law; Domat. 2 V. 759, s. 21.

the said A. B, by force and virtue and in exercise of the said power and authority, do by this my last will and testament in writing, signed and sealed by me in the presence of, and attested by, the three credible persons whose names are intended to be hereunder written as witnesses to my signing, sealing, and publishing this my last will, direct and appoint the sum of ———l., residue of the said sum of ———l., or such other sum of money as shall be to be raised under the trusts of the said term of 99 years, to be raised immediately after my decease out of my said family estates, under the trusts of the said term, to be divided amongst my said three children, Mary, Caroline, Elinor, and Edward, and any other child or children whom I may hereafter have by the said ———, in the shares and manner hereinafter mentioned, (that is to say) to be paid and divided among all my said younger children, in equal shares and proportions; the respective shares of my said daughters ——— and ———, to become vested and payable upon my decease, and to carry interest from that time at the rate of — per cent. per annum; and the share of my said son E. to be paid on his attaining the age of 21 years; and the share and shares of such child or such of the children I may hereafter have by the said ———, as shall be a daughter or daughters, to be paid at her or their age or respective ages of 21 years, or day or respective days of marriage, which shall first happen, and as shall be a son or sons, at the age of 21 years. And I do hereby direct and appoint, that the trustees or trustee for the time being of the said term of years, shall levy and raise, and pay to or for my said son E., and such child or children as I may hereafter have by the said ———, from the time of my decease till they respectively shall become entitled to receive their shares of the said sum of ———l., or such other sum of money as aforesaid,

for or towards his or her maintenance and education, any yearly sum not exceeding the yearly sum of 200*l.* a piece. And my will is, and I do hereby declare, direct, and appoint, that in case my said son E., or any such child or children as I may hereafter have by the said ———, shall die before his or her share or their respective shares of the said principal money shall become payable, that then the share and shares of him, her or them, or any of them, so dying, shall go to and be divided between my surviving children, if more than one, in equal shares and proportions, and if only one, then the whole shall go to such one surviving child, and shall be considered as part of the original portion or portions of such child or children.

Clause in a Will, directing a Power of leasing and of selling and disposing, to be inserted in the Settlement directed to be made of the Testator's real Estates.

AND I do hereby declare my will to be, that in such settlement there shall be contained a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time during the continuance of the said term of 2000 years hereby limited and created, and after the determination thereof, for the person or persons who for the time being shall, by virtue of the limitations in such settlement to be contained, be entitled to the said manors and hereditaments hereinbefore devised and comprized in the same term, for an estate of freehold, to grant, demise, limit, or appoint the said hereditaments, or any of

them, or any part thereof, for any term or number of years not exceeding 21 years, at the most improved rent, without taking any fine, and under the usual restrictions: and also a power to enable the said E. A. and G. C., and the survivor of them, and the executors and administrators of such survivor, from time to time, and at any time or times hereafter, at the request and by the direction of the person or persons who, for the time being, shall be entitled to the hereditaments to be comprized in the settlement hereby directed to be made as aforesaid, for an estate of freehold either in possession or in remainder, immediately expectant on the said term of 2000 years, signified by some writing under the hand and seal or hands and seals of such person or persons, attested by two or more credible witnesses, to make sale of or to convey in exchange for or in lieu of other hereditaments, all or any of the hereditaments to be comprized in the settlement so to be made as aforesaid, and the fee simple and inheritance thereof, as well as for the said term of 2000 years, due regard being had to the proviso next hereinafter contained or expressed, with the usual clauses, making the receipts of the said E. A. and G. C., or the survivor of them, or the executors or administrators of such survivor, effectual discharges to the purchaser or purchasers of the hereditaments which shall be so sold, and the usual directions to lay out the money to arise by such sale or sales in the purchase of other freehold lands of inheritance, or of copyhold lands convenient to be held with the lands hereby devised; or any of them, or so to be purchased or taken in exchange in pursuance of this my will, and to settle the lands so to be purchased, or so to be received in exchange as aforesaid, to the uses of the settlement hereinbefore directed to be made as aforesaid, or as near thereto as the nature of the tenure and circumstances will permit, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

Clause in a Will by which the Testator, after limiting his real Estates to his Son for Life, Remainder in the strict Form to the Sons of such Son successively in Tail Male, limits the same to his two Daughters, in Moieties, with Survivorship, for Life, to take exclusively of their Husbands, with the same Remainders in Tail to their respective Children in Succession, with cross ultimate Remainders; the whole being directory of a Settlement to be made.

AND for default of such issue, to the use of (trustees) and their heirs, during the lives of my said two daughters A. B. and C. D., and the life of the survivor of them, in trust, to pay the rents, issues, and profits thereof to such person or persons respectively, as they my said daughters respectively, and the survivor of them, by any writing or writings under their respective hands, or the hand of such survivor, shall from time to time as the same respectively shall become due or payable, but not by way of anticipation, direct or appoint, so as that my said daughters, during their joint lives, shall not have power of disposing of more than a moiety of each of the said rents, issues, and profits, and for want of such direction and appointment, into the proper hands of them respectively, in moieties, whilst both of them shall be living, and of the survivor of them, for their and her sole and separate use, exclusively and independently of any husband with whom they respectively may happen to intermarry, and not to be in anywise subject to the controul, debts, or engagements of their respective husbands: and my will is, that their respective receipts in writing, and the

receipt of the survivor, or the receipt or receipts of the person or persons to whom they respectively, or the survivor of them, shall direct the said rents, issues, and profits to be paid as aforesaid, shall be good and effectual releases and discharges for the rents, issues, and profits therein mentioned to be received: and upon further trust, during the lives of my said daughters and the life of the survivor of them, to preserve the contingent uses and estates to be limited as hereinafter mentioned, and from and after the decease of the survivor of them my said daughters, as to one undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter A. B. successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter C. D. successively, according to their respective seniorities in tail male; and as to the other undivided moiety or equal half part or share of the same hereditaments, to the use of the first and other sons of my said daughter C. D. successively, according to their respective seniorities, in tail male, and for default of such issue to the use of the first and other sons of my said daughter A. B. successively, according to their respective seniorities, in tail male; and from and after the decease of both my said daughters, and failure of issue male of both their bodies as aforesaid, then, as to the entirety of the same hereditaments, to the use of———, his heirs and assigns.

Devise of a Sum to be applied in releasing poor Prisoners.

I WILL and direct that my executors shall, within — months after my decease, lay out and expend the sum of 1000 l. in releasing and discharging such poor prisoners who shall be imprisoned at my decease in — prisons, or one of them, for debt, as my executors shall think fit, having regard in the application of the said sum hereinbefore for this purpose given, to such poor prisoners as shall be then in prison, whose conduct has been virtuous and industrious, whose families are in want, and whose confinement has been owing to losses and misfortunes, and not to idleness, drunkenness or debauchery*.

A Preamble to a Will, the Testator being about to go to Sea.

IN the name of God, amen. I, C. D., of —, mariner, being in good health and of sound mind, and being forthwith to depart this kingdom on a voyage to —, in the kingdom of —, and well knowing the danger of the seas and the uncer-

* If the testator is desirous of making this legacy cease in case of his giving the said sum, or to cease as to a proportionate part in case of his giving any less sum, in his life-time, it will be better for him to reserve this to be directed by a codicil, which may determine the quantum, and ascertain the fact, by a statement upon the face of it, and thus the executors will be relieved from a troublesome enquiry, during which it might be necessary to suspend the execution of the testator's bounty.

tainty of life, do, in case I die before I return to Great Britain (1), make this my last will and testament, as follows, that is to say, &c.

A general Form of a Codicil to a Will, where only some few additional Legacies are given.

WHEREAS I, A. B., of _____, have made and duly executed my last will and testament, in writing, bearing date, &c. Now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof; and I do hereby give, bequeath, &c. In witness whereof, I, the said A. B., have to this codicil set my hand and seal, this _____ day of _____.

Another general Form of a Codicil to a Will, where several Legacies are revoked.

WHEREAS I, A. B., of _____, &c. have by my last will and testament, in writing, duly executed, bearing date, &c. given and bequeathed to, &c. Now I, the said A. B., being desirous of alter-

(1) See the case of *Parsons v. Lance*, Amb. 557. This will is avoided by his return;

ing my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to _____, and I do give to each of them the said _____ and _____ the sum of _____l. only (1); and I give unto, &c. And I do ratify and confirm (2) my said will in every thing, except where the same is hereby revoked and altered as aforesaid. In witness, &c.

A nuncupative Will.

T. B., his will by word of mouth, made and declared by him about the _____ day of _____, in the presence of us who have hereunto subscribed our names as witnesses hereto. My will is that, &c.

(The very words)

I. G.
R. S.
F. G.

(1) Substituted legacies stand charged upon the same fund as the original legacies.

(2) All codicils are part of the will: therefore a codicil merely for a particular purpose, *and confirming the will in other respects*, does not revive any part of the will which had been revoked by a former codicil; 4 Vez. jun. 610, *Crosbie v. Macdonall*.

*Conclusion and Attestation of a Will written on
several Sheets.*

I DO hereby make, ordain, constitute, and appoint A. B. and C. D., executors of this my last will and testament, hereby revoking all former wills by me at any time heretofore made, and do declare this to be my last will and testament. In witness whereof I, the said T. S., have to this my last will and testament, contained in this and the four preceding sheets (or skins of parchment), set my hand and seal, (to wit) my hand to the bottom of each of the said four sheets (or skins), and my hand and seal to this last sheet (or skin), and my seal at the top of the said sheets (or skins), where all the said sheets (or skins) are fixed together, this — day of ———, 1755.

The writing contained in this and the four preceding sheets (or skins) was signed and sealed by the above named T. S., and by her published and declared as and for her last will and testament in the presence of us, who have heretofore subscribed our names in her presence, and in the presence of each other,

N. S.
T. B.
F. L.

Common form of Attestation.

SIGNED, sealed, published and declared by the above-named J. S., as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and in the presence of each other.

C. D.
E. F.
G. H.

Attestation of a Codicil.

SIGNED, sealed, and published by the said M. B., of N., as and for a codicil to be added to and be considered as part of her last will and testament, in the presence of us, who have subscribed our names in her presence,

R. S.
F. B.
R. T.

New Statute of Wills
1st Vic. C. 26 - } *Vide end of*
Index

INDEX

OF THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A.

ACCIDENT,

1. How far accident and surprise may operate a revocation of a will
408—411

ACCUMULATION,

1. By 39 and 40 Geo. 3. c. 98, No person, by deed or will, &c. shall settle or dispose of any real or personal property, in such manner that the rents or produce shall be accumulated for a longer term than therein mentioned; and any other direction shall be void, and the rents go to the persons entitled thereto, Sec. 1. 514
2. Nothing therein to extend to provisions for payment of debts, or for raising portions for children, or touching timber, § 2. 515
3. Nor to any disposition of heritable property in Scotland, § 3. 516
4. When restrictions shall take effect with respect to wills made before the passing of that act, § 4. *ibid.*
5. Clauses directing accumulation, 541, 561

6. Determinations of the courts upon the accumulation act 678 note.

ADEMPMENT,

- See Legacy, - - 5—7

ADMITTANCE,

1. Of the relation, in respect to copyholds, of the admittance to the surrender, - 326, 685 note.

AGREEMENT,

- See Lease 4; Power - 5

ALTERATION,

1. Difference in the effect of alteration and a mere erasure 377, 378
2. Alteration, being a fresh exercise of the disposing power, requires the will to be re-executed to give effect to the alteration if of freehold estate 378
3. And so it seems does erasure if it changes the quantity or quality of the estate - - 380

AMBIGUITIES,

1. Latent and patent ambiguity defined, - - 456, 459

INDEX.

2. Of mistakes in the names of persons - - - 457
3. Name mistaken.—Where the name used happens to belong to a person in being, and who might be in the testator's contemplation - 457
4. What ambiguity is created by devise to a person's family - 458
5. Or to one of the sons of J. S. 459
6. Of the mark of a patent and latent ambiguity - - 461, 464
7. Effects of a false or true description - - - 465
8. Some ambiguities patent are not incurable - - - 467
9. Of the lights reflected upon particular passages by the context 468
10. When Courts will look to circumstances out of the will for explaining ambiguities - 470 and note.
11. Of the effect of a blank left for the name of the legatee - 466
12. Blank in a codicil explained from the will - 470, note 11.
13. Where a will is hardly legible or the legacy in doubtful figures—how explained, - 467, note 10.

APPOINTMENT OF GUARDIAN.

See GUARDIAN BY WILL.

ARTICLES,

Revocation in Equity by articles to sell for valuable consideration - 315

ASSETS,

1. Assets will not be marshalled in favour of a charity, - - 226
2. Assets—equitable or legal—what, 247, 248 and notes.
3. Trusts shall be assets in the hands of the heir, by 29 Car. 2. c. 3. § 10. 503
4. And also estates pur auter vie, *ibid.* § 12. - - - 504

ATTENDANT TERMS,

See TERMS FOR YEARS.

ATTESTATION,

1. As to the persons capable of attesting wills. *See* TITLES, QUALIFICATION, SIGNATURE 8, WITNESSES.
 2. It is sufficient if the testator *might* see the witnesses attest the execution of his will, whether he *did* actually see them or not - - 163
 3. The practice of the civil law in this case - - - 164, note.
 4. Not sufficient that the testator be corporally present: he must possess his faculties, so as to give him a mental knowledge of the fact 167
 5. Whether the acknowledgment by the subscribing witness to the testator, would be sufficient 169
 6. In common law courts, one of the subscribing witnesses of a will may prove the attestation by the others, but in Courts of Equity it is otherwise - 179, 186, 188, and note.
 7. And if all the witnesses deny their hands, still the devisee may go into circumstances to prove the due execution of the will - *ibid.* 183
 8. Distinction between the attestation of wills and deeds - 184
 9. And of negotiable instruments and other instruments - 185
 10. Provisions of 25 Geo. 2. c. 6. respecting attestations of wills and codicils - - 508—514
 11. If one of the witnesses be dead, proof of his handwriting is admitted 188
 12. So if one of the witnesses be beyond sea - - *ibid.*
 13. Or have become insane 190
 14. And where a will is old, and no account of a witness's handwriting can be obtained, such proof is dispensed with - - *ibid.*
- And *see* SIGNATURE 8; WITNESSES 2—8, 16.

AUTER VIE.

1. Estates pur auter vie, are devisable by 29 Car. 2. c. 3. § 12. 503

INDEX.

2. And shall be assets in the heir's hand, &c. where there shall be no special occupant shall go to the executor - - - 504
3. Lord Vaughan's opinion as to the manner in which this estate comes to the heir - - - 49
4. The course of the succession must follow the inheritable nature of the land - - - 50 note.
5. Whether an executor may be a special occupant - - - 53
6. Whether and to what purposes the statutes have changed the nature of the estate - - - 55

B.

BARON AND FEME.

See HUSBAND; MARRIED WOMEN;
WIFE.

BEQUEST.

See LEGACY.

C.

CANCELLING.

1. Cancelling a will is an equivocal act - - - 365
2. If a testator make a second will, and in terms revokes the first, but it appears that the revocation of the first was only to give effect to the second; the second will is no revocation if ineffectual for want of the proper attestation - - - 366
3. Cancelling or tearing a will must be done *animo revocandi*, to be an effectual revocation of a will - - - 367, note.
4. What tearing or burning is sufficient to revoke - - - 370
5. What evidence is admissible to prove the intention - - - *ibid.*
6. A cancelled will is not necessarily revived by the destruction of a substituted will - - - 373

7. Of the presumption from finding a cancelled and an uncanceled will, - - - 375, note.
8. If testator makes duplicates and cancels one, the effect of the other is destroyed - - - 376

CHARITABLE USES.

1. Favour shewn to charitable gifts - - - 214, 215
 2. Assets not marshalled, in favour of a charity - - - 226
 3. Where the mode of disposition is undefined, it seems a purchase may be made for value by the trustees - - - 227
 3. A bequest to erect a charitable foundation imports a purchase, and is void - - - 229
 4. How general charitable bequests, without any specification of the objects, are to be effected - - - 230
 5. And what is the legal notion of charitable purposes - - - *ibid.* 231
- And See MORTMAIN.

CHILDREN.

1. Statute of 10 and 11 Wm. 3. c. 16. concerning children in ventre sa mere - - - 402, note.
 2. Of children in ventre sa mere, and posthumous children - - - 403, note.
 4. Provisions for children. See *Wills*, 71 *et seq.*
 5. What Equity understands by *younger children* - - - 517, 518, note.
- And see MARRIAGE, - - - 6, 9

CODICIL.

1. A difference in the civil law, but none in our law, as to publication, between wills and codicils, 154, note.
2. If a testator ratifies and confirms his will, he confirms it with every codicil which has been made to it, and if an intermediate codicil has changed any part of it, it is confirmed with these changes - - - 388
3. Difference between a codicil and a will in this respect - - - *ibid.*

Z Z

INDEX.

4. In what sense a codicil is to be understood as incorporated into and making a part of the will 476
5. How and when a codicil operates as a republication - 490, *et seq.*

And see LANDS, 4; WILL, 65, 66

COMMONS.

See DEVISE 2.

CONSTRUCTION.

1. Loose construction of the statutes of wills - - - 18, 21
2. Discretionary trusts, express trusts, and words of recommendation and desire--how considered in Equity 231
3. When words are *prima facie* sufficient to pass future interests in personality, that construction ought to prevail, unless controuled by the context - - - 363
4. General rules for the construction of wills, 428, 430, 431, note.
5. Of the distinctions between presumptions and positive rules of construction - 435, 436 note
6. The rule in construing a bequest to relations - 444, 446, note
7. Examples of rules of construction not to be opposed by extrinsic evidence - - - 446
8. The word '*family*' imports as definite an object of devise as the word '*relations*' - 459, note (3).
9. Of the lights reflected upon particular passages by the context 468
10. The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property - 470
11. Devise of 'Stock upon the farm,' carries what - - - 617, note
12. What is carried by the general words, messuages, farms, lands 619, note
13. What estate or interest in lands pass by what words - *ibid.*

COPYHOLDS.

1. Not affected by the statutes of fraud or of wills - - - 34, 36
2. Opinions of Lords Macclesfield and Hardwicke on this point 36, 39
3. Whether an appointment or declaration of the uses of a copyhold surrendered, may be without writing, 40
4. Attested will of copyhold may be revoked by an unattested will *ibid.*
5. How far such will, though operating as an appointment or declaration partakes of the qualities of a will 41
6. After-purchased copyholds do not pass by the antecedent will, unless republished by a surrender 303
7. Of the relation of the admittance to the surrender - - - 326
8. Of the necessity for the party's having the legal estate in him, at the time of his surrendering it to the use of his will - 685, note

CREDITOR.

1. If lands are charged with payment of debts, attestation of the will by a creditor is good, and he is a good witness to prove the execution, 25 G. 2. c. 6. § 2. - 509

See DEBT, 2—4; DEVISE, 5, 6, 8; LEGACY, 8—10.

CUSTOM.

1. A will disposing of the equitable estate in customary freeholds, must be duly executed and attested 41
2. But where there is a custom for surrendering these equitable estates to the uses of a will, they seem to be out of the statute of frauds 44
3. Wills of lands devisable by custom, must be in writing - - - 45

See COPYHOLDS; *London* (custom of); *York* (custom of).

INDEX.

D.

DEBT.

1. Actions for debt, under the statute, must be brought against the heir and devisee jointly - 249, 250
 2. Where a debtor gives to his creditor a legacy exceeding or equal to the amount of his debt, it is a satisfaction of the debt - 433, 434
 3. Of the opposite influences of the conflicting rules, that a debtor is not to be presumed to make a gift to his creditor, and that legacies imply a bounty - 434, note.
 4. Equity prevents the extinction of a debt, by a devise to the debtor, and holds the interest to pass by a bequest of the personalty; and extrinsic evidence to the contrary cannot be received - 473
- See* DEVISE, 5, 6, 8; EXECUTOR, 5, 6; FRAUDULENT DEVISES 3, 4; LANDS, 6; PERSONAL ESTATE, 1, 2.

DEVISE,

1. Devise of a rent out of land must be by will attested by three witnesses 88
2. So of tolls, navigation-shares, commons, profits of stallage, petty customs, market, fair, piscary 89
2. Devises to corporations void, in what cases 212, note; 214 note.
3. Of the statute of fraudulent devises, 243
4. Excepting clause, its effect 245
5. Devise for payment of debts out of the rents and profits only, within the exception - 246
6. *Secus*, where a devise for payment of debts does not provide for it in a practicable manner - *ibid.*
7. Devise of lands as the law would give them, is void 247, note.
8. Devises of lands for payment of debts favoured in Equity 248, note.
9. Contingent and executory interests are devisable - 296, note.
10. But a right of entry is not 298
11. All devises of lands are specific, 303

12. If a testator, having the legal estate, devises it and then passes it to trustees for himself and his heirs, this is a revocation of a will 305
 13. Devise of lands to executors for payment of debts, revoked by a subsequent conveyance to trustees for like purpose - 334, note.
 14. If a will containing a general devise of testator's estates be republished, an estate only contracted for after such general devise will pass - 478
 15. If an estate be limited to B. and his heirs, and B. die in the testator's life-time, the devise lapses, and a republication of the will does not give to the heir of B. a claim by purchase - 483
 16. So where the devise is of an estate to a man and the heirs of his body, succeeded by the words "and for want of such issue" - 484
 17. If a devisee under the will attest a will, the devise shall be void, and the attestation effectual, 25 G. 2. c. 6. § 1. - 509
- And *see* CHARITABLE USES 3, 4; FRAUDULENT DEVISES 3, 4; REVOCATION; WILL.

DONATIO MORTIS CAUSA,

1. Description of - 11, note.
2. Its nature defined *ibid.* 12, note.
3. What may be the subjects of a *donatio mortis causa* 12, note
4. Distinction between it and a legacy, 13, note.
5. What proof is necessary 14, note.

DURESS.

1. Duress vitiates a will - 31

ELECTION IN EQUITY.

1. An unexecuted will is not even of force in a Court of Equity to raise a case of *election* against a person taking a benefit in the personal estate by the same will - 107
2. But if in such unexecuted will there is a legacy to the heir, *upon condition*

INDEX.

- that he did not dispute the will, he is put to his election - 111
3. The doctrine of election does not prevail against creditors taking benefit under a devise for payment of debts, and disputing the will in other respects - - - 248, note.

EQUITY.

1. In what cases equity will help the defective execution of a will 69
 2. Where a disposition, not valid as a nuncupative will for informality, has been supported as a trust in equity 208, 209
 3. Discretionary trusts, express trusts, and words of recommendation and desire—how considered in equity 231
 4. Subsequent dealings with the estate in equity, how far revocative of wills - - - 304
- See DEVISE, 8; LANDS, 4; MORTGAGE, 4—8.

EQUITY OF REDEMPTION.

1. An equity of redemption of a freehold estate cannot pass by an unattested will - - - 105
2. Difference between an equity of redemption and a mere trust, 338, note (4).

ESTATE.

1. Estates by custom, how affected by the statute of frauds and of wills 34, *et seq.*
 2. Effect of the statute of frauds on estates *per auter vie* - - - 46
 3. Lord Vaughan's opinion that this estate comes to the heir by proper descent - - - 49
 4. Where the estate directed to be purchased cannot be had, other lands may be bought - 377, note.
 5. Query where the place and not the estate is specified - - - *ibid.*
 6. What passes under the word *estate* 619, note
- See COPYHOLD; POWERS 9

ERASURE.

1. Difference between alteration and erasure in a will - - - 377
2. Erasure of part of a will, not a revocation of the whole - 380, 381
3. Where erasure alters the quantity or quality of the estate it is a fresh exercise of the disposing power 380, note.

EVIDENCE.

1. Of the evidence of the attestation of wills - - - 173, *et seq.*
2. In common law courts *one* of the subscribing witnesses may prove the attestation by the others - 179
3. And if *all* the witnesses deny their hands, still the devisee may go into circumstances to prove the due execution of the will - *ib.* 180
4. Whether the evidence of the subscribing witnesses can be received against their own attestation 180
5. Of the proof to establish a will in Courts of Equity - - - 186
6. All the witnesses, if living, must be examined - - - 187
7. When proof of hand-writing of a witness is sufficient. 189, 190, 191
8. Proof of wills disposing of personality - - - 191
9. Of proving a will in the common and solemn form - - - 193
10. Of the degree of evidence necessary to establish a nuncupative will, 204
11. Of parol and extrinsic evidence, see Chap. III. *passim.*
12. Whether parol evidence be admissible to determine the presumption in the case of double legacies in the same and distinct instruments, 384
13. Lord Thurlow's doctrine, that all sorts of evidence are admissible to rebut presumptions, and even that constructive operation of an instrument, which is referable to presumption, with different degrees of force: but not where it is a question as to the construction of words *que*

INDEX.

words, or as to the effect of limitations, or technical expressions,

442, 443

14. Examples of rules of construction, not to be opposed by extrinsic evidence - - - - - 446

15. Distinction between admitting evidence to *raise* and to *rebut* an equity, 449, note.

16. On the admissibility of parol evidence in cases of presumptive trusts in the executor, for the next of kin of the testator as to the surplus undisposed of by will - - - 451

17. Of the general admissibility of parol evidence to rebut the presumption against the executor - - - 452

18. Testator's declarations, how far evidence - - - - - 453

19. Contemporary declarations must be attended to - - - - - 454

20. But with different degrees of weight all these declarations are admissible - - - - - 455

EXECUTOR.

1. Whether an executor can be a special occupant - - - - - 58

2. Whether he can take the surplus for his own benefit, and how far the statutes have changed the nature of the estate - - - - - 55

3. When a legacy takes away an executor's right to the surplus, 449, note.

4. Of the presumptive trust in the executor for the next of kin, as to deprive him of the surplus undisposed of by the will - - - 448—450

5. In equity a debt is not released by a creditor's making his debtor his executor - - - 473, note (12)

6. *Secus*, at law - - - - - *ibid.*

7. Where trustees for sale are also made executors, 520, 521, note.

F.

FAIR.

See DEVISE, 2.

FELO DE SE.

1. The will of persons committing suicide, how far valid - - - 33

FEME COVERT.

See MARRIED WOMEN, WIFE.

FIDEI-COMMISSA.

1. Nature of, in the Roman law 9, 10, note.

FRAUD.

1. Fraud, its effect on a will - 31
2. Acts fraudulently done or procured to be done, whether and how far they can effect a revocation 281, *et seq.*

FRAUDS (STATUTE OF).

1. Restraints imposed by it on the making of wills - - - - - 22
2. Does not extend to copyholds 34
3. A sum of money devised out of land is part of the land in equity, and such disposition is within the statute of frauds - - - - - 80
4. Construction of Section VI of this statute - - - - - 250
5. Grammatical reading of the language of this section, whereby it is brought into agreement with the provisions of the preceding clause - - - 253
6. Legal distinctions founded upon this construction - - - - - 254, 255
7. Provisions of the statute, at length, 499—508

FRAUDULENT DEVISES.

1. Statute of fraudulent devises, 242
2. Excepting clause, its effect, 245
3. Devise for payment of debts out of the rents and profits only, within the exception - - - - - 246
4. *Secus*, where a devise for payment of debts does not provide for it in a practicable manner - - - *ib.*
5. Remedies at law upon the statutes, 248, 249
6. Of the estate *pur autre vie* under the statute of frauds - - - 250

INDEX.

FREEHOLD.

1. A will, disposing of the equitable estate in customary freeholds, must be executed according to the statute of frauds - - - 41
2. But, where there is a custom for surrendering these equitable estates to the uses of a will, they seem to be out of the statute - - - 44
3. All equitable estates of freehold must be devised by will duly executed and attested - - - *ib.* 45
4. *Descendible freehold*, what, 49, 50
5. Things affixed to the freehold are not devisable by will unattested 98
6. Therefore trees will not - 99
7. Nor grass and herbage - 101
8. Nor heir-looms - *ib.* 102
9. But growing corn will, in what cases 99, 100, and note.
10. If a man, having *freeholds* and leaseholds, devise all his *lands and tenements* by a will unattested, the leaseholds will not pass - 118

FUNDS.

1. Property in the funds is devisable by will in writing, attested by two or more witnesses - - - 61

G.

GAVELKIND.

1. Whether gavelkind lands were devisable by custom - 6, note (2)

GUARDIAN.

1. Of the appointment of guardians by will - - - 230
2. Guardians at common law and by custom - - - 234
3. Guardianship by nurture, what 236
4. Guardianship in socage - 237
5. Testamentary appointment 238
6. Probate not necessary to the validity of the appointment under the statute of frauds - - - 239
7. Appointment, how revocable 240, 275

8. Duration of guardianship - 240
9. Remedies incident to the office, *ib.*
10. Of the powers of a testamentary guardian - - - 241

H.

HEIR.

1. Trust estates descending shall be assets in the hands of heirs, 29 Car. 2, c. 3, § 10 - - - 503
2. But no heir shall, by reason thereof, become chargeable of his own estate, *ibid.* § 11 - - - *ibid.*
3. Estates *pur autre vie* are also assets in his hands, *ibid.* § 12 - 504

HEIR-LOOMS.

1. Derivation of the word, 101, note.
2. Heir-looms cannot be devised separately by the owner of the fee simple, in what case - - - 101
3. What may be considered as heir-looms - - - 102

HUSBAND.

1. In what case a trustee for the wife, 524, note (6).
2. May demand administration of his wife's personal estate - 507

I. J.

INFANT.

1. An infant cannot make a will of lands - - - 31
2. Yet, sometimes by particular custom, infants are enabled to devise lands, 45
3. The testamentary capacity as to chattels commences in males at 14, in females at 12 - - - 28

See LEGACY 13.

JOINT-TENANT.

1. Difference between tenants in common and joint-tenants, as to the effects of partition - 340, note

INDEX.

L.

LANDS.

1. By will duly executed, charging *land generally* with legacies, a testator enables himself to lay any number of additional legacies on the land, by a subsequent testamentary disposition unexecuted - - - 77
2. Distinction between the case of subsequent legacies charging the land, by virtue of a former will charging them generally upon the land, and a reservation by will of a *future power of disposition* - - - 78
3. A sum of money devised out of land is part of the land in equity; and such disposition is within the statute of frauds - - - 80
4. A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property, as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil - - - 81
5. To effect this absolute conversion, a clear intention ought to be demonstrated - - - 82
6. Where a testator shews both the *real* and *personal* estate to be equally in his contemplation, as the funds out of which the legacies are to be satisfied, a revocation effectual as to the personalty, but insufficient as to the real for want of being attested according to the statute, will leave the land still subject to the charge 83, 84
7. The court cannot see the testator's intention with respect to his real property, unless he express it by will according to the statute - - - 86
8. Devise of a rent out of land must be by will attested by three witnesses 88
9. If a man, having freeholds and leaseholds, devise all his *lands and tenements* by a will unattested, the leaseholds will not pass - - - 118
10. If a man devise all his lands and tenements *at a particular place*, and have only leaseholds answering to the local description, the leaseholds will pass, 119
11. Lands, acquired by purchase after the will, do not pass by it 296
12. A right of entry into lands is not devisable - - - 298 and note.
13. But, if after disseisin an entry be made, the disseisin is purged, the title relaxes, and the lands pass by a will prior to the disseisin - - - 299
14. All devises of lands are specific 303
15. What passes under the word 'lands' 619, note

And see MORTGAGES 2.

LEASES.

1. *In general*, a renewal of a lease is a revocation of a will, whether it be of a chattel or a freehold lease 349
2. Difference between freehold and chattel leases in this respect 350
3. Whether the renewal of a chattel lease is a revocation of a will, depends on whether the devise is specific or general 353 and note, 357
4. If the renewed lease be not executed in testator's life-time, an agreement for such new lease will not revoke a will - - - 355
5. Where the disposing words would have passed the leases if renewed in testator's life, any renewals after his death by his representatives will pass by such words - - - 362

LEGACIES.

1. Of the power of bequeathing legacies, in the different stages of the Roman law - - - 8, note.
2. *Legata et fidei commissa*, what, 9, 10, note.
3. Distinction between a legacy and a *donatio mortis causa* - - - 13, note.
4. A legacy (given by a written will,) lapsed, or void for some legal objection, may be the subject of a nuncupative disposition - - - 207
5. Ademption of legacies - - - 417
6. Wherever the subject of a specific legacy is withdrawn, the legacy must cease - - - 418, 419

INDEX.

7. Subtlety of the distinctions between specific and general legacies, 418
 8. Debts paid by legacies, see DEBTS.
 9. *Double Legacies* by the same instrument - - - 437
 10. By different instruments *ibid.*
 11. State of the doctrine as to the presumption of the courts in the cases of double legacies in the same and distinct instruments - 438, 439
 12. Whether parol evidence is admissible to determine this question 440
 13. If a legacy, given for an infant's benefit in one way, cannot be applied in that way, it may in another, 539, note.
 14. Under a bequest to servants, who are included - 561, note.
 15. Of the period of vesting, both as to legacies and legatory portions 631, 632, note.
 16. Of the abatement of legacies 633, note
 17. Of interest upon legacies 635, 636, note
 18. Origin of, and observations upon the Accumulation Act 679—681, note
- See LANDS 1.

LEGATEE.

1. Legatee must be capable of taking under the will of the testator 33
2. A legatee may recover his legacy out of the real estate, without proving a will - - - 77, note.
3. Legatees, how far admissible as evidence under the Roman law 152, 153 and note.
4. The rule of the Spiritual and Common Law Courts, where the witness was a legatee or devisee - 154
5. If a legatee under a will attest its execution, his legacy shall be void, 25 Geo. 2, c. 6, § 1 - 509

LONDON (CUSTOM OF)

1. Restraints on the testamentary power, by the custom of London, removed by the statutes. 7, 8, not.

LUNATICS.

1. Lunatics incapacitated from making a will; and of the lucid intervals 30

M.

MARRIAGE.

1. The general rule is, that marriage and the birth of a child is an implied revocation as well of a will of real as of personal estate - - 396
2. Origin and gradual adoption of the rule - - - *ibid.* note (3).
3. Whether the previous disposition of the whole estate is necessary to ground the application of the rule 397, note (4).
4. Lord Mansfield's doctrine in respect to the admissibility of extrinsic evidence to rebut the presumption, 397
5. The principle of the rule according to Lord Kenyon - - 398
6. Whether a will is revoked by the birth of more children by a first marriage after a will, and a second marriage without children - 399
7. A subsequent marriage and the birth of a posthumous child operate as a revocation - - - 400
8. The rule does not depend so much on intention as on the notion of a tacit condition, that in the event of marriage and a child, the will should not stand - - - 401
9. Both marriage and the birth of a child must concur, and both events must take place after the will 404
10. Conditions in restraint of marriage how considered by Courts of Equity 527, note.

MARKET.

See DEVISE, 2

MARRIED WOMEN.

1. Of their capacity to make a will, 28
2. In what manner their testamentary dispositions take effect - 29, 30
3. May make wills with consent of their husbands 393, note (2), 394

INDEX.

4. Effect of a woman's marriage upon her will - - - 411
5. The marriage of a woman after making her will is alone enough to revoke it, without the birth of a child, *ibid.*
6. Whether, if she become discoverd again, and die a widow, the will is revived? - - - 413
7. A married woman may execute a power, given to her while sole 415

MISTAKE.

1. Of mistake, as affecting the revocation of wills - - - 383
2. Where testator expressly revokes under a misapprehension of facts, the revocation fails - - - 384
3. Of the case mentioned by Cicero in his treatise *De Orators* 384, note.
4. The mistake must appear to be in that, which constituted the impelling motive to the revocation 385 & note.
5. Mistake in names; see AMBIGUITIES 2, 3.

MONEY.

See FUNDS, 1; LANDS, 3, 4.

MORTGAGES.

1. Mortgages, in equitable consideration, are not within the clauses respecting wills in the statute of frauds, 103
2. Will not in general pass by a devise of lands, tenements, and hereditaments - - - 104 and note.
3. Mortgagor cannot pass his equity of redemption by a will unattested 105
4. The equitable consideration of a mortgage, as personal estate, is not to narrow the effect of the statute of mortmain - - - 106, note, 221
5. Different consideration of mortgages in courts of law and equity 333 and note.
6. In equity, conveyances by way of mortgage, or for payment of debts generally, are only revocations to the extent of the charge 332, 334
7. True ground, on which mortgages in fee are considered in equity, as only revocations *pro tanto* 337

8. Difference between an equity of redemption and a mere trust, 338, note (4).

MORTMAIN.

1. Import of a 'gift in mortmain,' 210
2. Origin and effect of the statutes of mortmain - - - *ibid.* 211
3. Provisions of the mortmain act, 9 G. 2, c. 36 - - - 216, 217
4. Lord Hardwicke's exposition of the act - - - - - 218

See TITLE, CHARITABLE USES.

N.

NAME,

- Of the clause directing the adoption of testator's name - - - 573, note

NAVIGATION SHARES.

See DEVISE, 2.

NUNCUPATIVE WILL.

1. Under what circumstances now admitted - - - - - 204
2. Qualifications of witnesses necessary to establish a nuncupative will *ibid.*
3. Degree of evidence requisite *ib.* 205
4. Of altering a written will by a nuncupative disposition - - - 206
5. The provisions of 29 Car. 2, c. 3, respecting nuncupative wills 506, 507
6. Exception as to soldiers' and seamen's wills, 29 Car. 2, c. 3, § 23 507

O.

OUTLAW.

1. Persons outlawed incapable of bequeathing their goods - - - 33
2. But may devise lands - - - *ibid.*

P.

PAROL EVIDENCE.

See EVIDENCE, 11, 13.

INDEX.

PARTITION.

1. Mere partition is no revocation of a will - - - 340
2. Difference between joint tenants and tenants in common, as to the effect of partition - - - *ib.* note.
3. Where there is any other purpose declared beside the mere purpose of the partition, the will is revoked 341
4. Case in which a will must of necessity be revoked by partition 347

PERFORMANCE.

- Distinction between performance and satisfaction in equity 422 et seq.

PERSONAL ESTATE.

1. Personal estate is liable in the first instance to the payment of debts 84, 85, note.
2. But merely charging the real estate, or even creating a term for the payment of debts, does not exempt the personalty - - - 85 note.
3. Of the proof of wills respecting personalty; see EVIDENCE 11
4. The advantage of testator's treating all the property as personal 519 note.
5. Of the conversion of real into personal estate in equity, when partial and when total - - - 522 note.
6. No nuncupative revocations of wills of personal estates since the statute of frauds - - - 202

See LANDS 6.

PISCARY.

See DEVISE 2.

PORTIONS.

1. Presumptions against double portions - - - 432
2. Precedent of power, given in a will, to portion children 516, 518

POWERS.

1. Of powers to be executed by will 62
2. Powers of appointment, to be exe-

cuted *generally by will*, without any directions as to the mode in which such will is to be executed, must be executed by a will attested according to the statute of frauds *ibid.*

3. So, with respect to *trust* estates 63
4. But, if such power extend to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass personal estate - - - *ibid.*
5. If an agreement be entered into, to charge lands with such sums as a stranger shall by his last will direct, such direction will be good if made by an unattested will - - - 64
6. *Semble* otherwise, if such power be given or reserved to the owner or owners of such inheritance *ibid.*
7. When an act is done under a power, the law views it as done by the granter of the power 69, note.
8. A power may be exercised, without reciting it - - - 71 note.
9. A man cannot by will reserve a *power* of disposing of real estate by a future unattested will or codicil 72 and note.
10. An appointment by will, in execution of a power, works by the will according to the nature and qualities of that instrument - - - 391
11. Such an appointment therefore is revocable, without any fresh power reserved 392 and note, 393
12. A married woman may execute a power given to her while sole 415
13. Precedent of power given in a will to portion children 516, 518

PREAMBLE.

A solemn one - - - 606, and note.

PRECEDENTS.

See WILLS 71 et seq.

PROBATE.

1. Probate of a will not necessary, to entitle a legatee to recover out of the real estate - - - 77 note.
2. Of proving a will in the common and solemn form - - - 193

3. Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts 194 *et seq.*
4. Probate not necessary to the validity of the appointment of guardians under the statute of frauds 239
5. Regulation of 29 Car. 2. c. 3. sec. 21. respecting probates of wills 507

PROHIBITION.

1. No prohibition to the Ecclesiastical Court will lie, in matters merely spiritual 195 note.

PUBLICATION.

1. Formality of publication before the statute of frauds 187
2. What is now requisite to constitute a sufficient publication 138, 140
3. Publication of a will before three witnesses, *at several times*, is sufficient 173

PURCHASERS.

1. Of the clause, in wills, for discharging purchasers, and of their liability in the absence of such clause, to look to the application of the purchase money 520, note.

Q.

QUALIFICATION.

1. Of the qualification of witnesses to a will 148
2. What offences disqualify 149
3. The infamy of the *offence*, and not of the *punishment*, disqualifies *ib.* 150, 151, and note.
4. If the competency of a witness, after being lost, has been restored before the attestation, the credit required by the statute of frauds is also restored, except in the case of a conviction of perjury on the statute 151 and note.
5. Qualification of attesting witnesses in the civil law 152, note.
6. The rule of the Spiritual and Common Law Courts, where the witness was a legatee or devisee 154, 156

7. A person interested at the time of examination, but not at the time of making a will may give evidence 159, note

R.

REDEMPTION.

See EQUITY OF REDEMPTION.

RE-ENTRY.

1. Effect of a re-entry upon a condition broken 320

RELATION.

1. Doctrine of relation, respecting the revocation of wills 317
2. Relation, strictly defined 323
3. Difference as to the effect of disseisin and subsequent entry, where the disseisin is before, and where it is after the will 318
4. Relations will, in many instances, help acts in law, but will never help acts of the parties 319, note.
5. But they will not defeat lawful collateral acts 320, note.
6. If testator aliens upon condition, after making his will, and then enters for the condition broken—query, is the will revoked 321
7. Of the relation in respect to copyholds, of the admittance to the surrender 3
8. The execution of all things extortory respects the original act, and have relation thereto 332,

RENEWAL.

See LEASE 3, 4

RENT.

1. Devise of rent out of la by will attested by three .

REPUBLICAT

1. Effects and meaning
2. Whether there can

INDEX.

- republication of a will since the statute of frauds - 480
 3. A will may be republished by repeating the ceremonies required by the statute - 481, note.
 4. If an estate be limited to B. and his heirs, and B. die in the testator's lifetime, the devise lapses; and a republication of the will does not give to the heir of B. a claim by purchase - 483
 5. Every codicil, duly executed and attested, (unless it be confined in expression,) is a re-publication of a previous will - 490
 6. If a will has a specific reference to a thing subsisting when it was first published, but subsequently withdrawn, the re-publication of it by a codicil will not make it operate upon another thing which has come by substitution into the place of the thing so withdrawn, though similar in amount and quality - 493
 7. Re-publication of wills of *personal* estate - 496
 8. The destruction of the revoking instrument may operate as an implied re-publication by setting up the original will - 497
- REVOCATION OF WILLS:**
1. Of the revocation of wills, under the statute of frauds - 251
 2. Revocations express or implied - 256, 257
 3. A will, though rendered inoperative by existing circumstance may revoke a former will - 258, 259
 4. Where there is any inconsistency between two wills, the revocation of the former by the subsequent will is confined in its extent to the subjects of the inconsistent dispositions - 261
 5. An expressed intention to revoke, no actual revocation - 268
 6. Inconsistency between the will and subsequent acts - *ibid.*
 7. Grant of a less interest, than was given by the will, to the same person operates as a revocation *in toto* - 270
 8. *Scd.* to a stranger - *ibid.*
 9. Or, if with a different commencement - *ib.* 271
 10. Where there are two inconsistent wills of the same date, or both without date, they are both void for uncertainty - 272
 11. No intention to revoke can be inferred from a will of lands not executed according to the statute - 274 and 275, note.
 12. But other legal acts, though instrumentally inoperative, may nevertheless revoke a will - 275
 13. Thus a will duly executed, though from extrinsic circumstances rendered inoperative, may nevertheless operate to revoke a prior will - *ibid.*
 14. So, imperfect instruments of conveyance - 277
 15. So, a power of appointment ill executed - *ibid.*
 16. So, grants to persons under disabilities - 279
 17. Acts fraudulently done, or procured to be done, are no revocation - 281—284
 18. Nor, a deed executed by mistake - 282, note.
 19. Subsequent conveyances revoke a will - 285
 20. A recovery by tenant in tail, after making his will, to his own use, is a revocation - 286
 21. So an ineffectual recovery - 287
 22. So, a scottment by a tenant in fee, after making his will, to his own use in fee, is a revocation - 287
 23. Conveyance upon a special trust, or for a particular purpose, how far a revocation - 287
 24. Where that, which is done to an equitable estate, would (if the estate were legal) pass it out of one person to another, such act is a revocation in equity - 290
 25. If testator's estate be parted with but for a moment, and taken back to the same use, the will is revoked - 299
 26. Testator must be actually seized at the time of making his will - 295

- 27. If a testator having an equitable estate, makes his will and afterwards takes a conveyance of the legal estate to himself and his heirs, it is no revocation - - - 305, and note
- 28. *Secus*, if having the legal estate, he devises it, and then passes it to trustees for himself and his heirs *ibid.*
- 29. If, where the legal estate is called in after a new will made, any new use is engrafted upon it, the will is revoked - - - *ibid.*
- 30. Revocation in equity by articles to sell for valuable consideration 315
- 31. Revocation of wills, how far affected by the doctrine of relation 317, *et seq.*
- 32. Where testator aliena upon condition, after making his will, and then enters for the condition broken 321
- 33. How far mortgages operate as a revocations of wills 332, *et seq.*
- 34. Alteration of testator's estate, is a revocation of the will 337, note
- 35. Cancelling is a revocation 365
- 36. Of revocations by codicil 387
- 37. Revocations of wills of personal estate - - - 416

See ALTERATION;—ERASURE;—CANCELLING;—LEASE 1—4;—LEGACY 6;—MARRIAGE;—MISTAKE;—MORTGAGES 6;—PARTITION 1;—RELATION 1;—TEARING 1

S.

SATISFACTION (IN EQUITY).

- 1. Distinct meanings of the terms *satisfaction* and *performance* 420
- 2. Satisfaction is the general term expressing the final effect of performance, election, and reformation 424

SIGNATURE.

- 1. What is a sufficient signature to a will - - - 121
- 2. Sufficient if a will be written by tes-

tator's own hand with his name inserted - - - 122

- 3. Nor is it material whether such signature be at the top or bottom of the will - - - *ib.* note, and 123
- 4. But if testator begin to sign in regular form, and does not complete it, the statute is not satisfied 124
- 5. Whether *sealing* is signing 125, 127, and note, 131
- 6. Whether making a mark, where the party is unable to write, is a sufficient signature - - - 128
- 7. The practice of the civil law, where the testator could not write 131, note
- 8. Sufficient, if witnesses attest upon the acknowledgment by the testator, without seeing him actually sign 131, 252, 256, note (2)

SOLDIERS' AND SEAMEN'S WILLS.

- 1. Soldiers and Seamen may make nuncupative wills, under what restrictions 209

SPECIAL OCCUPANT.

- 1. Whether an executor might be a special occupant - - - 53

STALLAGE (PROFITS OF)

See DEVISE, 2

STAMP.

- 1. If testator had his name on a stamp it would be sufficient if he impr his name instead of writing it

STOCK.

- 1. Bequests of stock, when not - - -
- 2. If a trustee of stock transfer out power, he is liable to restore the individual stock the money it produced trust - - -

See FUNDS, 1

SUBSEQUENT

- 1. Subsequent acts

INDEX.

revocative of wills; see **REVO-**
CATION 27, *et seq.*

SUBSCRIPTION.

See **SIGNATURE**;—**WITNESSES**.

SURRENDER.

See **COPYHOLDS**;—**RELATION** 7;—**WILL** 59.

T.

TEARING.

Tearing a will is sufficient revoca-
tion, under what circumstances
371, note, 383, note

TENANT IN COMMON.

Difference between tenants in com-
mon and joint tenants, as to the ef-
fects of partition - 340, note

TERMS OF YEARS.

1. Terms of years cannot be created
but by will duly attested 90, note
2. Though they will pass by an unat-
tested will - 90
3. Terms *attendant upon* the inheritance
are within the statute - *ibid.*

TENANCY FROM YEAR TO YEAR.

1. A tenancy from year to year is de-
visable and transmissible 362
2. And the good will, or tenant-right
which accompanies it, passes with it
363

TENURES.

1. Military tenures, when abolished 17
2. Influence on the disposal of landed
property - *ibid.*

TESTAMENT.

See **NUNCUPATIVE WILL**, and **WILL**

TESTAMENTI FACTIO.

1. Progress of the *Testamenti factio* in
the Roman jurisprudence 2, note

2. Successions to property how regu-
lated prior to the twelve tables *ib.* 3
3. Number of witnesses necessary
4, note

TESTATOR.

1. Who may be a testator 27—32
2. Declarations of testator, how far ad-
missible as evidence - 453

And see **EVIDENCE** 18—20; **ATTES-**
TATION 2—4; **LAND** 1.

TREASON.

Persons attainted, cannot dispose of
property by will - 32

TRUST.

1. Discretionary trusts and express
trusts, how considered in equity 231
2. Difference between an equity of re-
demption and a mere trust 338, note (4)
3. Of the presumptive trust in the ex-
ecutor for the next of kin of the
testator as to the surplus undisposed
of by the will - 448
4. Of the rule in respect to trustees be-
coming purchasers - 523, note
5. Trustee, transferring stock without a
power, is liable either to restore the
stock, or to pay the money it pro-
duced, to *cestui que trust* 524, note (5)
6. Husband when trustee for the wife
ib. note (6)

U.

USES.

See **CHARITABLE USES**;—**WILL** 28

W.

WIFE.

1. Husbands, not compellable to dis-
tribute the personal estate of their
wives - 508

See **MARRIED WOMEN**.

WILL.

1. Of making and publishing wills 1
2. Progress of the law - *ibid.*
3. Of the *Testamenti factio* among the Romans - 2, note
4. Successions to property how regulated previously to the twelve tables *ibid.* 3
5. Number of witnesses necessary 4, 5, note
6. Of the ancient common law of England - 7, 8
7. Restraints upon the testamentary power by the customs of York and London, removed by statutes 7, note
8. Of the power of bequeathing legacies in the different stages of the Roman law - 8, note
9. *Legata et fidei-commissa*, what 9, 10, note
10. Disposals of land by will, under the feudal system - 9—15
11. Operation of the 27 H. 8. c. 10. upon wills - 15—16
12. Loose constructions of the statute of wills - 18
13. Restraints imposed by the statute of frauds, on the making of wills 22
14. Not necessary that witnesses should be privy to their contents 23
15. Of the testamentary capacity 27
16. Capacity of married women to make a will - 28
- 16.* In what manner their testamentary dispositions take effect 29, 30
17. A will is vitiated by fraud, or by duress - 31
18. And also by the infancy of the party - 31, 32
19. How affected by conviction, attainder, outlawry, and self-murder 32
20. The statute of wills does not extend to copyholds - 34
(And see title COPYHOLDS.)
21. A will, disposing of the equitable estate in customary freeholds, must be executed and attested according to the statute of frauds - 41, 42
22. But, where there is a custom for surrendering these equitable estates to the uses of a will, they seem to be out of the statute - 44
23. All equitable estates of freehold must be devised by will duly executed - *ibid.*
24. Wills of lands devisable by custom, must be in writing - 45
25. Defective execution of a will, when helped by equity - 69
26. A man cannot by will reserve a power of disposing of real estates by a future unattested will or codicil 72, and note
27. An instrument, not intended so have effect till the death of the party, is *testamentary* in its operation and quality, *whatever may be its form* 73
28. Difference between a conveyance to uses, and a will, in respect to the legality of reserving a power of future disposition - 74
29. Every paper, to which a will duly attested refers, if it comprise a disposition of real property, to be effectual as a testamentary paper, must be incorporated originally into the will, or be executed according to the statute; and such paper, to be so incorporated, must be distinctly referred to and described by such will - 75
30. Of wills charging lands 77—90
(And see title LANDS.)
31. What things affixed to the freehold will pass by will - ?
32. Trees will not pass by will untested -
33. Nor grass or herbage -
34. Nor heir-looms - *ib*
35. But growing corn will -
36. An unexecuted will is not force to raise a case of *election* a person taking a benefit in sonal estate by the same will
37. But if in such unexecuted there is a legacy to the *condition* that he did not will, he is put to his election
38. Of the testator's signature subscription of the will

INDEX.

39. Formality of publication 137
40. A will, though it be proceeded in at *different times*, and often suspended and resumed, will need only one execution - - - 140
41. Of the execution of a will written on *different pieces* of paper 141—144, and note
42. Difference between a writing in continuation of a will formerly begun, and a republication - - - 145
43. The subscription of a will need not take notice that they attested in the testator's presence - *ibid.*
44. Of the time and manner of making the attestation - - - 163
45. Proof of wills relative to personal property - - - 191
46. Of proving a will in the common and solemn forms - - - 193
47. Of the form of the testament, 195
48. A memorandum, written by a person in contemplation of death, and with *a design* to make it operative after that event, may be proved in the Ecclesiastical Court as testamentary; and if so received, will be supported in Equity - - - 196, 200
49. Of altering a written will by a nuncupative disposition - - - 206
50. Of soldiers' and seamen's wills, 209
51. Appointment of guardians by deed revocable only by will duly executed 239, 240
52. A man cannot make an irrevocable will - - - 256 note (11)
53. An instrument designed as a will, and not made *merely* to revoke a former will of the same lands, will not take effect unless executed agreeably to the statute - - - 258
54. Of inconsistent wills - - - 261
55. Testator must be actually seised at the time of making his will 295
56. Lands, acquired by purchase after the will, do not pass by it 296
57. Contingent and executory interests are deviseable - *ibid.* note
58. Of the resemblance between wills and conveyances to uses 300 note.
59. Difference, as to the nature of a will according to the civil law and the law of England - - - 301
60. After-purchased copyholds do not pass by the antecedent will 303
61. Except where the will is republished by a surrender - *ibid.*
62. A will may be so confined in terms as to be of necessity revoked by partition - - - 347
63. Testator may by will pass any future chattel interests, whatsoever, provided they come within the description of the bequest 357, 358
64. In case of alteration; a will must be re-executed - - - 378
65. If a man ratify and confirm his last will, he ratifies and confirms it with every codicil which has been made to it; and if an intermediate codicil has charged any part of it, it is confirmed with these charges, for the codicil is *part* of it 388
66. But, if a will be made, and then another will making some different dispositions, and then a codicil confirming the will first made, the alterations made by the intermediate will are gone - - - *ibid.*
67. Married women may make wills with consent of their husbands 393, note (2) 394
68. Evidence and construction of wills 428, *et seq.*
69. Of the republication of wills 476
70. Provisions of 39 and 40 Geo. 3. c. 98. for restraining all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited - - - 514—516
71. Precedents of wills 516, *et seq.*
72. Power given in a will to a person to whom a life estate is limited, to charge the estate with portions for

- younger children, varying in amount, according to the number of children to be provided for 516—518
73. Form of a will, containing dispositions of real and personal property, the whole to form one fund and go as personal estate 519—530
74. A will disposing principally of real property in shares, among children and grandchildren 531—539
75. A will disposing of real and personal estate by way of provision for children 540—552
76. A will, comprising various dispositions of real and personal estate, partly of testator's own estate, and partly in performance of various trusts and obligations imposed on him by antecedent settlements 552
77. Of the clause making accruing shares subject to survivorship 526, note (7)
78. Will disposing principally of real property in shares among children and grandchildren 531
79. Will disposing of real and personal estate by way of provision for children 540
80. What articles comprehended under different words and phrases 540—542, note
81. Will of real and personal estate, partly of testator's own estate, and partly in performance of various trusts imposed by antecedent settlements 552
82. Will, directing a settlement, with limitations in a strict form, for preserving the estate in the family of the testator 565
83. Where testator's object is to preserve the devised estates, as long as long as possible in his family, how this is to be effected 567, note
84. Where the estate directed to be purchased cannot be had, other lands may be bought 577, note
85. Where the place and not the estate is specified *ibid.*
86. Of the effect of the clause direct-

- ing leaseholds to be settled, as far as the law will allow, upon trusts correspondent to the uses of the freehold 584, note
87. A will, disposing only of personal property 589
88. Will, comprising directions for a settlement of freehold, copyhold, and leasehold estates, with various limitations and provisions, by way of annuities and rent-charges; containing also various bequests of chattels and sums of money 617
89. A merchant's will, providing for the continuance of his trade under the management of his executors for the benefit of his family, and for the future introduction of his sons into the business 643
90. Comprehensive devise and bequests of various descriptions of property to trustees, for sale and accumulation of the produce 676
91. Devise of an advowson to trustees to present a certain person to the next avoidance 683
92. Words of a will whereby a testator charges his debts, legacies, &c. upon all his estate 683
93. Clause to prevent an annuitant under the will from parting with his annuity 684
94. Devise of copyholds and leaseholds for lives and years, to trustees, to the same uses as the freehold 685
95. Devise of the residue of the testator's personal estate, in trust to sell, call in, dispose of, and convert into money, such part as shall consist of stock or real security and invest it in securities, and to out to make provision for a col-
relation
96. Bequest of Jewels, &c.
97. Appointment under a power the benefit of testator's children
98. Clause in a will directing of leasing, and of disposing, to be inserted

INDEX.

- | | |
|--|--|
| <p>ment directed to be made of the testator's real estates - - - 693</p> <p>99. Clause in a will by which the testator, after limiting his real estates to his son for life, remainder in the strict form to the sons of such son successively in tail male, limits the same to his two daughters, in moieties, with survivorship, for life, to take exclusively of their husbands, with the same remainders in tail to their respective children in succession, with cross ultimate remainders; the whole being directory of a settlement to be made - - - 695</p> <p>100. Devise of a sum to be applied in releasing poor prisoners - - - 697</p> <p>101. A preamble to a will, the testator being about to go to sea - - - 697</p> <p>102. A general form of a codicil to a will, where only some few additional legacies are given - - - 698</p> <p>103. Another general form of a codicil to a will, where several legacies are revoked - - - 698</p> <p>104. A nuncupative will - - - 699</p> <p>105. Conclusion and attestation of a will written on several sheets - 700</p> <p>106. Common form of attestation - 701</p> <p>107. Attestation of a codicil - <i>ibid.</i></p> <p>And see the followings titles in this Index, viz. ACCUMULATION; ALTERATION; CANCELLING; CHARITABLE USES; DEVISE; DONATIO MORTIS CAUSA; ERASURE; FREEHOLD; GUARDIAN; LEASE; LEGACY; MARRIAGE; MISTAKE; MORTGAGES; MORTMAIN; NUNCUPATIVE WILL; PARTITION; POWERS; PUBLICATION; RELATION; REPUBLICATION; REVOCATION; SOLDIERS AND SEAMENS' WILLS; SIGNATURE; SUBSCRIPTION; TEARING.</p> <p style="text-align: center;">- WITNESSES,</p> <p>1. Not necessary that they should be acquainted with the contents of a will - - - 23-26</p> | <p>2. Suffice the as wishes</p> <p>3. Substantive take the testator</p> <p>4. Qualify</p> <p>5. Who</p> <p>6. The the as</p> <p>7. The by the the as</p> <p>8. If the being the as the as</p> <p>9. One Roman</p> <p>10. The mon was</p> <p>11. A exam exec</p> <p>12. W feren</p> <p>13. Pro point</p> <p>14. Of with Eccl</p> <p>15. Qu sary ment</p> <p>16. If attes lega tion</p> <p>17. If ment credi with § 2.</p> |
|--|--|

INDEX.

The credit of every witness as
attesting it to be subject to the deter-
mination of the Court and of a jury.
114, § 6.

See ATTORNEY; EVIDENCE; WILL;
14, 33

YEAR TO YEAR.

1. Tenancy from year to year is de-
terminable and transmissible 362

2. And the good-will or tenant right,
which accompanies it, passes with it.
363

YORK (CUSTOM OF).

1. Relates to the testamentary
power by the custom of York, re-
moved by statute 7, 8 note.

* The custom of York still in force
as it respects the appointment of
guardians in certain cases. 294

6. All real person's estate may be
disposed of by will executed and
directed by this Act -

7. No infants - nor minors -

8. To be in writing - signed at
the last in the presence of
2 witnesses present together -
who shall attest & subscribe
in the presence of Testator

9. Will under Power, good if
executed as above -

10. No publication requisite

11. Co-heirs may be witnesses

12. As to revocation of Wills

Form of Affidavit of an Executor to prove a
Will before a Surrogate and in which case
no special Commission is necessary

I, A. B. of _____ in the County of _____ the
Executor named in the last Will and Testament
of _____ late of _____ in the
County of _____ deceased, make the Oath
and saith That _____ made diligent
search and due inquiry after and in respect
of the personal Estate and Effects of the said deceased
in order to ascertain the full amount and value
thereof; and that to the best of _____ knowledge,
Information and belief, the whole of the Goods
Chattels and Credits of which the said deceased
died possessed within the Archdeaconry of _____
(exclusive of what the deceased may have been
possessed of or intitled to as a Trustee for any
other person or persons, and not beneficially,^(a)
_____ and
_____ and without deducting any thing on account of
the Debts due and owing from the deceased) were
the value of £ . ^(b) And this Dep^t lastly made Oath
that the said deceased, was not possessed of or intitled
to any Leasehold Estate or Lib^y for Years, either absolute or
determinable in time, to the best of his knowledge, Information
and belief.

Sworn on the 1st - 1820 before me Surrogate

(a) If the deceased died possessed of any Leasehold Estates, the words
in red Ink are to be inserted and those scored under in red Ink
omitted.

(b) If the deceased did not die possessed of any Lease

